No. 89-912

In The

Supreme Court of the United States

October Term, 1989

BETH BABCOCK, by and through her guardian; ERIKA BABCOCK; and ANGELA LONG,

Petitioners,

v.

WANDA TYLER and MARK BRONSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In this case of first impression, is a caseworker entitled to absolute immunity under 42 U.S.C. § 1983 for having conducted a constitutionally inadequate investigation of a dangerous prospective foster father and having placed foster children in the foster father's care where he subsequently abused them sexually, by reason of the fact that the placement was approved by a juvenile court without knowledge of the inadequate investigation?

2. Is a caseworker entitled to absolute immunity for having failed to protect foster children from abuse inflicted by a foster father by reason of the fact that a juvenile court conducted periodic reviews of the children's continued foster care placement?

LIST OF PARTIES

The parties to the proceedings and before this Court are not the same.

Petitioners:

Beth Babcock, a minor, by and through Rudolph G. Babcock, her guardian and father.

Erika Babcock, who has reached the age of majority since the commencement of this action.

Angela Long.

Respondents:

Wanda Tyler, a caseworker employed by the Washington Department of Social and Health Services.

Mark Bronson, a caseworker employed by the Washington Department of Social and Health Services.

Other Parties:

Rudolph G. Babcock, a plaintiff below in his individual capacity. He is the father of Beth Babcock and Erika Babcock, and the stepfather of Angela Long.

Willis and Elizabeth Babcock, husband and wife, were plaintiffs below. They are the parents of Rudolph Babcock and the grandparents of Beth Babcock and Erika Babcock.

Arthur J. Bieker, attorney at law, was a defendant below. He acted as a court-appointed attorney for petitioners in the juvenile court proceedings. The claims against him were voluntarily dismissed.

LIST OF PARTIES – Continued

Lee Edward Michael, an uncle to petitioners, and a defendant below. An order of default has been entered against him below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

No. _____

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PETITION FOR WRIT OF CERTIORARI

Petitioners Beth Babcock, by and through her guardian, Erika Babcock and Angela Long respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on September 6, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 884 F.2d 497, and is reprinted in the appendix, App. 1-17, *infra*.

The opinion and order of the United States District Court for the Eastern District of Washington (Myers, Magis.) has not been reported. It is reprinted in the appendix, App. 18-39, *infra*.

JURISDICTION

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit is invoked under 28 U.S.C. §1254(1). This petition is filed within 90 days from the entry of the judgment below on September 6, 1989.

STATUTE INVOLVED

42 U.S.C. §1983.

STATEMENT OF THE CASE

The instant case involves three girls in foster care in the state of Washington – sisters Beth and Erika Babcock and their half-sister Angela Long – who were repeatedly raped, sodomized, and sexually assaulted by their foster father over an eighteen-month period, from May or June, 1982, to October 31, 1983, beginning when they were six,

eight, and twelve years old, respectively. The District Court held that a jury could have determined that the abuse could have been avoided entirely if the state foster care caseworker who supervised the girls had simply checked the foster father's criminal record. (App. 21)

The foster father, Lee Michael, was an unemployed alcoholic who had been convicted of armed robbery, probation violations, drunk driving, and traffic violations, and charged with raping a 63-year-old widow and sexually assaulting a friend of his wife. (CR 289, Ex. 26) In addition to abusing the three petitioners in this case, he also raped a fourth foster child and his own daughter. (App. 6) He was ultimately convicted of multiple counts of rape and sexual abuse, (CR 289, Ex. 48) and is currently incarcerated in a state prison.

The caseworker, respondent Wanda Tyler, knew of Michael's alcoholism and unemployment when she selected him to be the foster father. (Supp. ER 241-42) She conducted a cursory investigation of him, consisting of only one interview, which she termed a "home study." (Supp. ER 79, 232-33) In the home study, Tyler failed to ask Michael about his criminal background, though the questionnaire that she and all other workers in the agency used required that that question be asked. (Supp. ER 233) She failed to check records which were readily available in her own agency's office, and which would have revealed Michael's criminal history. (Supp. ER 190) She failed to interview anyone other than Michael. And she placed the children in Michael's home even though she did not license Michael as a foster parent.

Tyler knew that Michael had previously sought custody of the girls in the state of Louisiana and that the Louisiana court had rejected his bid. (App. 25) She knew that, after this rejection, Michael had returned to Washington and tried to encourage the girls to leave their foster home and come to live with him. (Supp. ER 63, 67-68, 78) Tyler's supervisor had told Michael that he should stay away from the girls because he was a disruptive influence on them. (CR 289, Ex. 31) Nevertheless, as the District Court found, Tyler encouraged Michael in his efforts by not only permitting Michael to arrange surreptitious meetings with the girls, but also by advising the girls not to tell anyone about these meetings. (ER Tab J 12)

When Michael made allegations about the girls' father and about prior events in the girls' lives, (Supp. ER 61, 65, 67, 76) Tyler failed to check those allegations. (Had she done so, she would have learned that Michael's allegations were untrue.) Instead, Tyler submitted those allegations as "background information" in her report to the Washington Juvenile Court, (Supp. ER 236) as if she had verified their accuracy. It was this report, and its recommendation that the children be moved to Michael's home, that the juvenile court accepted. The subsequent move set the stage for all the abuse which followed.

Petitioner Beth Babcock, her sister Erika, and her half-sister Angela Long had entered foster care in August, 1981, in the state of Washington, following an order issued by a Louisiana court in a dependency proceeding brought in that State. (ER Tab A) Angela's sister Aryn, who is not a party to this matter, entered foster

care along with the other three girls. Prior to the initiation of the Louisiana dependency proceeding, the four minor girls had been living in the state of Louisiana with Rudolph Babcock, who is the father of Erika and Beth and the stepfather of Angela and Aryn.

Petitioners concede for purposes of this appeal that when the girls arrived in Washington, they were under the "care, custody and control" of the Washington Department of Social and Health Services ("DSHS")[1] (App. 26) DSHS assigned respondent Wanda Tyler, one of its caseworkers, to supervise the four girls. (CR 139, Ex. 21)

Initially all four girls lived in the home of Rudolph Babcock's parents, but, within the next four months, Tyler moved Angela to two different foster homes. DSHS did not seek court approval or ratification of either move; having custody and control of the children, the agency claimed that it had no legal obligation to do so. (App. 26) During the same time period, Tyler conducted her home study of Lee Michael and his wife Janet, who was the sister of all four girls' deceased mother. (Supp. ER 236)

On March 31, 1982, in a routine Juvenile Court review to determine "the efforts which [the girls' father] ha[d] made to correct the conditions which led to removal [of his daughters]," pursuant to RCW 13.34.130(3)(a),

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[1] Petitioners had disputed that issue below, and the District Court did not resolve it. (See discussion at App. 28.) Respondents have always contended that the Louisiana order gave DSHS "care, custody, and control," such that DSHS did not need court approval to change foster homes.

DSHS submitted a report from Tyler which recommended, among other things, that the children reside with Michael. (Supp. ER 240)

At this review, the Juvenile Court Commissioner, after engaging in a brief colloquy with the DSHS attorney, approved Tyler's recommendation that Aryn and Angela reside in the Michaels' home.

> Mr. Miller [attorney]: You should have a home study in your file, your Honor.
>
> Court: And they are recommending it?
>
> Mr. Miller: Yes, sir.
>
> Court: I will honor that. (CR 289, Ex. 13).

Tyler immediately moved Angela and Aryn into Michael's home. She then transferred the children's case to respondent Mark Bronson, also a DSHS caseworker. On April 19, 1982, Bronson moved Beth and Erika into Michael's home. (App. 5) By May or June, 1982, Michael had begun raping Aryn, Beth, and Erika, and sexually molesting all four of the girls.

On May 4, 1982, the Juvenile Court again reviewed the status of the dependency. (CR 139 Ex. 14) At the conclusion of that review, again without taking testimony, the court ratified the move of Erika and Beth to Michael's home. (CR 139 Ex. 14)

In August, 1982, the Juvenile Court held another review, at which Rudolph Babcock sought to regain custody of the girls or, alternatively, to have them moved to foster care in Wisconsin, where he resided. This was the first hearing in Washington at which any sworn testimony was taken.

At the review, Bronson testified to his work on the girl's case, which did not include any follow-up investigation on Michael's background. Babcock cross-examined Michael regarding Michael's hostility to Babcock and his refusal to help reunify the family. No one produced evidence as to Michael's criminal record, alcoholism, employment problems, or sexual abuse of the girls. At the end of the hearing, the court agreed to Bronson's request that the children remain in the Michael home.

Michael continued his sexual assaults upon all four girls. Respondent Bronson, though charged with the duty to supervise and monitor the children in Michael's home, failed to do so. It was not until October 31, 1983, that the authorities learned of the abuse and removed the girls from Michael's home. (Supp. ER 137) Michael's arrest, conviction, and incarceration followed.

Petitioners commenced this damage action under 42 U.S.C. §1983 in March, 1984, in the United States District Court for the Eastern District of Washington. Petitioners claimed that respondents violated their Fourteenth Amendment liberty interest in being free of harm while in the state's custody by placing petitioners in a dangerous foster home after having conducted a constitutionally insufficient and professionally deficient investigation of the foster father; and by subsequently failing to protect the children from the sexual abuse which the foster father inflicted upon them. (Petitioners included other federal and state claims which they do not raise in this Court.)

On January 11, 1988, the Eastern District entered an opinion and order on cross-motions for summary judgment. The court upheld the legal and factual sufficiency of petitioners' constitutional claims, relying upon *Doe v. New York City Dept. of Soc. Serv.*, ("Doe I"), 649 F.2d 134 (2d Cir. 1981) and *Doe v. New York City Dept. of Soc. Serv.*, ("Doe II"), 709 F.2d 782 (2d Cir.), *cert. den.* 464 U.S. 864 (1983); and *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir.) *cert. den.*, ___ U.S. ___, 109 S.Ct. 1337 (1989). The court found that "it seems clear that the girls have a protected right to be free from the harm which befell them here." (App. 19). Under a standard of either deliberate indifference, as enunciated by this Court in *Estelle v. Gamble*, 429 U.S. 97 (1976), or substantial departure from professional standards, *Youngberg v. Romeo*, 457 U.S. 307 (1982), the court held that petitioners possessed sufficient evidence to submit the claim to a jury. (App. 21)

The Eastern District also denied respondents' motion for summary judgment on absolute and qualified immunity. (App. 35-37) The respondents appealed this part of the order to the Ninth Circuit, invoking appellate jurisdiction under 28 U.S.C. §1291 and the collateral order doctrine as applied to the denial of immunity in *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

Respondents' appeal was limited to the issue of absolute immunity.[2] The Ninth Circuit reversed and dismissed

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[2] However, the Ninth Circuit law is that the state has the affirmative constitutional obligation to protect the welfare of children in its care. *Lipscomb v. Simmons*, 884 F.2d 1242, 1247 (9th Cir. 1989). Previously, in *Gibson v. Merced County Department of Human Resources*, 799 F.2d 582, 589 (9th Cir. 1986), the court had assumed, without deciding, the existence of this right.

the case. It held that respondents had absolute "quasi-prosecutorial" or "quasi-judicial" immunity for placing the petitioners in a dangerous foster home and for subsequently failing to protect them from the assaults by the foster father. (App. 14) As a matter of public policy, the court found that caseworkers required absolute immunity "to permit them to perform their duties without fear of even the threat of section 1983 litigation." (App. 15)

REASONS FOR GRANTING THE WRIT

I.

A Uniform National Standard For Caseworker Immunity Is Needed.

This Court has addressed the entitlement to absolute immunity for numerous types of government employees, such as police officers, parole officers, administrative law judges, public defenders, prosecutors and judges. These cases have provided uniform precedent to lower courts in cases where those officials claim immunity. This Court has yet to address the issue of the existence and extent of immunity for foster care caseworkers.

More than 250,000 children are presently in foster care in the United States, according to information from the Child Welfare League of America. Almost all of them are in foster care systems which are similar to Washington's in ways material to this case.

Most placements of children in foster care begin with a court proceeding and involve subsequent periodic court

reviews.[3] Federal law encourages such proceedings, since it prohibits states from obtaining federal reimbursement for foster care of children unless those children are placed in care by a court order, 42 U.S.C. §§672(a)(1), 672(e) (1980), and have reviews of their placements at least once every six months. 42 U.S.C. §675(5)(B) (1980) The purpose of these reviews is for the court to determine whether the parents are able to care for the child, and whether the agency has made "reasonable efforts . . . to make it possible for the child to return to his home . . . " 42 U.S.C. §671(a)(15), to further Congressional reunification goals. The purpose of the hearings is not for the court to determine the suitability of the foster parents or whether the foster parents are caring for the child properly; that is the responsibility of the caseworkers.

Like petitioners in this case, a disturbing number of foster children are physically and/or sexually abused by their foster parents. See, e.g., discussion in *B. H. v. Johnson*, 715 F.Supp. 1387, 1392 (N.D. Ill. 1989); *L. J. v. Massinga*, 838 F.2d 118 (4th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 816 (1989).

The decision of the court below has potentially grave consequences for all of these children. According to the court, government-employed caseworkers are entitled to absolute immunity for all acts and omissions which they take with respect to foster children because those actions

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[3] For a compilation and discussion of relevant state laws, see J. W. K. International Corp., *Comparative Study of State Case Review Systems* (1982); National Council of Juvenile and Family Court Judges, *The Judicial Review of Children in Placement Handbook* (1981).

are necessarily "taken in connection with, and incident to, ongoing child dependency proceedings." (App. 14) This holding potentially grants absolute immunity to virtually all actions taken by virtually all caseworkers with respect to foster children in all states which receive federal foster care funds.

II.

The Decision Below Conflicts With A Decision Of This Court.

This Court has denied immunity in a factually analogous circumstance. In *Malley v. Briggs*, 475 U.S. 335 (1986) a police officer allegedly conducted a constitutionally insufficient criminal investigation, and requested and received an arrest warrant based upon that investigation by submitting to a magistrate an affidavit lacking in probable cause. In the ensuing §1983 damage action, which the arrestee brought after a grand jury failed to indict him, the police officer claimed absolute immunity, arguing that his acts were functionally equivalent to those of a prosecutor or a complaining witness. This court rejected the comparison with a prosecutor because requesting a warrant is further removed from the judicial process than is a grand jury proceeding. *Id.* at 342-43.

Similarly, in the case at bar, the respondents argue that they have absolute immunity because their actions were equivalent to functions performed by a prosecutor. However, like the police officer's unconstitutional acts in *Malley*, respondents' unconstitutional conduct in failing to secure a safe environment for petitioners and failing to

protect the children from injury occurred completely outside the context of the judicial proceeding.

The police officer in *Malley* also argued that he should be shielded from liability because the magistrate's issuance of the warrant rendered the officer's conduct *per se* reasonable. Although the officer made this argument in the context of qualified immunity, it is substantially identical to respondents' principal contention in the instant matter that they are absolutely immune because the juvenile court accepted their recommendation to place the children with Michael. This Court, in rejecting Malley's argument, exposed the fallacy of the officer's attempt to hide behind the immunity of the judge: "If the magistrate issues the warrant [without probable cause], his action is . . . an unacceptable error indicating gross incompetence or neglect of duty. The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate." *Id.* at 346 n. 9.

No meaningful distinction exists between the police officer's claim for immunity in *Malley* and the caseworkers' claim of immunity here. The actionable conduct in *Malley* was the investigation of a crime leading to the issuance of an arrest warrant by a judge. The actionable conduct here was the investigation of a prospective foster home leading to a court-approved placement of foster children, followed by failure to supervise that home and to protect the children from an abusive foster father. Both cases involved unilateral investigations followed by judicial decisions relying upon those investigations. In fact a police officer has a more persuasive argument for immunity than a caseworker because the analogy to a prosecutorial function has "some force." *Id.* at 343.

The court below all but ignored this Court's decision in *Malley*. (App. 11) The court did not carefully scrutinize the caseworker's precise function in investigating the suitability of Michael and compare that function to a prosecutor, witness or judge, as this Court carefully analyzed a police officer's function in investigating a crime and seeking an arrest warrant. Instead the court below swept aside the rationale in *Malley* and broadly extended absolute immunity to shield all of a caseworker's responsibilities to a child in foster care, not merely those responsibilities which are "intimately associated" with the judicial phase of foster care. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976).

III.

The Decision Below On This Important Issue Of Public Policy Ignored This Court's Prior Rulings

This Court's careful and cautious "approach to questions of immunity under §1983 is by now well established." *Malley v. Briggs*, 475 U.S. 335, 339 (1986). Because §1983 "on its face admits of no immunities," *Id.*, all new claims of absolute immunity must be carefully and precisely analyzed under this Court's approach. This Court has admonished that no room exists for the type of "free-wheeling policy choices" made by the court below in the instant case. *Id.* at 342.

A. Common Law Immunities

The first step in determining the existence of absolute immunity under §1983 is to determine whether the

defendant "was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871 . . . " *Malley v. Briggs*, 457 U.S. 335, 340 (1986); *Tower v. Glover*, 467 U.S. 914, 924 (1984). The court below did not consider this issue. In fact, caseworkers were not immune from liability at common law because they did not exist in 1871. The first child welfare organization in the United States, the Society for the Prevention of Cruelty to Children, was not founded until 1874.[4] Moreover, there is authority supporting the lack of immunity at common law for individuals in a position similar to caseworkers: guardians of orphans. See, discussion of common law liability in *Eugene D. v. Karman*, ___ F.2d ___, 1989 WL 135366 (6th Cir., Nov. 13, 1989) (Merritt, C. J., dissenting).

The lack of common law immunity may itself be sufficient to preclude a finding of absolute immunity for caseworkers. A court cannot create immunities where none existed before, solely because of what it considers "to be sound public policy." *Tower v. Glover*, 467 U.S. 914, 923 (1984). In failing to analyze the historic immunity of caseworkers, the court below ignored this Court's analytic framework for assessing claims of immunity.

B. Public Policy.

As a matter of public policy, this Court has been "quite sparing" in the extension of immunity because of the "undeniable tension between official immunity and the ideal of the rule of law." *Forrester v. White*, 484 U.S. 219, 223-224 (1988). "For executive officers in general, . . . qualified immunity represents the norm." *Harlow v.*

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[4] H. Kempe and R. Helfer, *The Battered Child* (1980), p. ix.

Fitzgerald, 457 U.S. 800, 807 (1982). This Court has refused to provide absolute immunity to state governors, *Scheuer v. Rhodes*, 416 U.S. 232 (1974); Cabinet officers, *Mitchell v. Forsyth*, 472 U.S. 511 (1985), *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); and members of prison disciplinary committees, *Cleavenger v. Saxner*, 474 U.S. 193 (1985).

The court below, in determining that caseworkers are entitled to absolute immunity, ruled that they performed a "quasi-judicial" or "quasi-prosecutorial" function. The fact that the court below could not decide whether the function was judicial or prosecutorial tends to indicated that it was neither. That fact also demonstrates how broadly and dramatically the court below extended the doctrine of absolute immunity. Several other factors, which the court below failed to consider, might also lead to the conclusion that the caseworkers performed neither a "quasi-prosecutorial" nor a "quasi-judicial" funtion.

First, this Court has held that those seeking absolute prosecutorial immunity must perform functions "intimately associated with the judicial phase of the *criminal* process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). (emphasis added) This immunity both protects the integrity of the criminal process and stems from the common law immunity of prosecutors in criminal proceedings.

Proceedings to interfere with parental rights are not criminal proceedings, and this Court has so recognized. *Santosky v. Kramer*, 455 U.S. 745, 768 (1982); *Lassiter v. Department of Social Services of Durham County, North Carolina*, 453 U.S. 18 (1981). Because of the underlying differences between criminal and dependency proceedings, absolute immunity may not be appropriate for the latter

while it is for the former. The Court below, in its haste to find absolute immunity, failed to consider these differences.

Second, proceedings to interfere with parental rights are not part of the common law; they are in derogation of the common law. *Matter of Malpica-Orsini*, 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975), app. dismissed sub nom. *Orsini v. Blasi*, 423 U.S. 1042 (1976). The historic considerations which protect the integrity of the criminal process, mandating absolute immunity for prosecutors, do not exist for those who bring dependency proceedings. Several Circuits have concurred, holding that when caseworkers remove children from their parents, the caseworkers perform a function more closely analogous to police officers than to prosecutors and therefore are not entitled to absolute immunity. See Point IV, infra. Accordingly, a careful analysis is needed before deciding to extend immunity to an entirely new class of individuals.

Third, the functions of the government official seeking immunity must be truly analogous to the duties of judges or prosecutors. *Butz v. Economou*, 438 U.S. 478, 514-15 (1978). The Court has declined to grant absolute immunity when those functions are not. Thus, while a prosecutor have absolute immunity in prosecuting a case, *Imbler v. Pachtman*, 424 U.S. 409 (1986), he does not have absolute immunity in authorizing wiretaps. *Mithchell v. Forsyth*, 472 U.S. 511 (1985). Even a judge, who has absolute immunity for all his decisions, *Stump v. Sparkman*, 435 U.S. 349 (1978), loses that immunity when he decides to fire an employee. *Forrester v. White*, 484 U.S. 219 (1988). And a police officer, who has absolute immunity when testifying in a criminal trial, *Briscoe v. Lahue*, 460 U.S. 325

(1983), does not have absolute immunity for presenting a warrant request to a magistrate. *Malley v. Briggs*, 475 U.S. 335 (1986).

Certiorari should be granted where a circuit court has failed to follow this Court's "well established" approach in an important case of first impression. The immunity issue centers around whether the caseworkers' conduct, in investigating Michael as a prospective foster parent and failing to supervise or monitor the children after they were in Michael's home, was so "intimately associated" with the juvenile court proceeding to deserve extension of absolute immunity for that conduct. The Ninth Circuit failed to engage in the necessary careful analysis.

Here, Tyler unilaterally decided to conduct a home study of Lee Michael and then made the sole judgments concerning how it would be done. The juvenile court neither ordered nor supervised that home study. Tyler's failure to inquire into Michael's criminal background was never before the juvenile court, and petitioners had no way of knowing about Tyler's omissions. Tyler's report did not contain evidence of Michael's criminal background, nor did it describe the scope or adequacy of Tyler's investigation. In fact Tyler admitted that if she had discovered Michael's criminal background she would not have recommended the placement.

It is undisputed that in failing to conduct a rudimentary criminal background check, Tyler was not acting as an "advocate" in the courtroom and her background

investigation was not subjected to the rigors of the adjudicatory process. Similarly, respondents' failure to supervise the children in Michael's home and to protect them from his sexual assaults was never part of the juvenile court proceeding.

More importantly, the court below ignored this Court's careful analytical framework. In failing to engage in the careful analysis of the caseworkers' functions in initially investigating and subsequently supervising the Michael home, the court below ignored this Court's prior rulings.

IV.

The Circuits Conflict As To The Immunity Of Foster Care Caseworkers.

Not only does the Ninth Circuit opinion conflict in principle with *Malley*, but it conflicts with decisions on caseworker immunity from other circuits as well.

The recent proliferation of cases on the issue of caseworker immunity demonstrates the present need for this Court's guidance. Most circuits have followed the analytical framework mandated by this Court, and have carefully limited immunity to cases where the particular function of the caseworker is "intimately associated with the judicial phase" of a dependency proceeding and not to cases where caseworkers function like police officers. *Achterhof v. Selvaggio*, 886 F.2d 826 (6th Cir. 1989) (no absolute immunity for investigating a complaint of child maltreatment); *Spielman v. Hildebrand*, 873 F.2d 1377 (10th Cir. 1989) (no absolute immunity for removing a child); *Hodorowski v. Ray*, 844 F.2d 1210 (5th Cir. 1988) (no

absolute immunity for removing a child); *Austin v. Borel*, 830 F.2d 1356 (5th Cir. 1987) (no absolute immunity for removing a child from the child's parents without court order); *Robison v. Via*, 821 F.2d 913 (2nd Cir. 1987) (no absolute immunity for removing a child); *Malachowski v. City of Kiene*, 787 F.2d 704 (1st Cir.) *cert. denied* 479 U.S. 828 (1986) (absolute immunity for the "quasi-prosecutorial" removal of children); *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984) (absolute immunity).

Two circuits have recently decided cases in which foster children sued, claiming that foster care caseworkers failed to protect them from dangerous foster parents. In both *Doe v. Bobbitt*, 881 F.2d 510 (7th Cir. 1989), reh. den. October 26, 1989, and *Eugene D. v. Karman*, ___ F.2d ___, 1989 Westlaw 135366 (6th Cir. 1989) the courts ruled that the caseworkers were entitled to qualified immunity because the foster child's right to protection was not clearly established at the times of the injuries. The attorneys for the plaintiff Brenda Doe have informed counsel of record for petitioners in the instant matter that they intend to file a petition for certiorari in this Court.

Most, if not all, of the other decisions have followed the analytical framework mandated by this court for determining claims of absolute immunity. In the instant case, by contrast, the court below abandoned that framework. It based its ruling upon the freewheeling policy assertion that caseworkers' "immunity must be absolute to permit them to perform their duties without fear of even the threat of section 1983 litigation." (App. 15) In so doing, the court drastically expanded its prior rulings on

caseworker immunity, and ignored the rules of law established by this Court and by the other circuits.

CONCLUSION

This Court should answer the call to provide uniform national precedent on the issue of immunity for caseworkers. The petition should be granted.

Respectfully submitted,

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December 5, 1989.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUDOLPH BABCOCK, individually and as guardian for two minor children, Beth Babcock and Erika Babcock; ANGELA LONG; WILLIS BABCOCK AND ELIZABETH BABCOCK and ELIZABETH BABCOCK, husband and wife, *Plaintiff-Appellees,* v. WANDA TYLER; MARK BRONSON, in their individual capacities, *Defendants-Appellants,*	No. 88-3521 D.C.No. CV-84-271-SPM OPINION

Appeal from the United States District Court
For the Eastern District of Washington
Smithmore, P. Myers, Magistrate, Presiding

Argued and Submitted
May 4, 1989 – Seattle, Washington

Filed September 6, 1989

Before: Arthur L. Alarcon and David R. Thompson, Circuit Judges, and A. Wallace Tashima, District Judge.*

Opinion by Judge Thompson

*Honorable A. Wallace Tashima, United States District Judge for the Central District of California, sitting by designation.

SUMMARY

Courts and Procedure

Reversing and remanding the district court's judgment with instructions to dismiss, the court held that Washington Department of Social and Health Services caseworkers are entitled to absolute immunity.

Appellee Rudolph Babcock, on behalf of himself and the two Babcock girls and Angela Long, filed a civil rights action pursuant to 42 U.S.C. § 1983 against Washington DSHS caseworker appellants Wanda Tyler and Mark Bronson. Tyler and Bronson performed investigative and placement services in child dependency proceedings which had been transferred from Louisiana to Washington. Consistent with a recommendation of the DSHS, the girls were placed in the home of Lee and Janet Michael, Lee Michael sexually abused the children, and it was discovered later that he had a prior criminal record which included charges of forceable and attempted rape and sexual assault. No inquiry was made concerning his criminal record during the caseworker's investigation. The district court determined that Tyler and Bronson were not entitled to absolute immunity.

COUNSEL

Owen F. Charke, Jr., Senior Assistant Attorney General, and Michael E. Grant, Assistant Attorney General, Spokane, Washington, for the defendants-appellants.

Michael R. Seidl, Bullivant, Houser, Bailey, Pendergrass & Hoffman, Portland, Oregon, and Robert J. Crotty, Lukins & Annis, Spokane, Washington, for the plaintiffs-appellees.

OPINION

THOMPSON, Circuit Judge:

In this case we consider whether Washington Department of Social and Health Services ("DSHS") caseworkers are entitled to absolute immunity. The caseworkers performed investigative and placement services in child dependency proceedings which had been transferred to Washington from Louisiana pursuant to interstate compact. Consistent with a recommendation of the DSHS, the Washington court placed the children in the home of Lee and Janet Michael. Lee Michael sexually abused the children. He had a prior criminal record which included charges of forceable rape, attempted rape and sexual assault. No inquiry was made concerning this criminal record during the caseworker's investigation. Had it been, the criminal record would have been discovered.

In this ensuing lawsuit which was brought pursuant to 42 U.S.C. § 1983, the district court determined that the caseworkers were not entitled to absolute immunity, denied their motion to dismiss and denied their motion for summary judgment. Relying on principles we articulated in *Meyers v. Contra Costa County Dep't of Social Servs.*, 812 F.2d 1154 (9th Cir.), *cert. denied*, 108 S. Ct. 98 (1987), and *Coverdell v. Dep't of Social and Health Servs.*, 834 F.2d 758 (9th Cir. 1987), we concluded that the caseworkers are entitled to absolute immunity; and we reverse.

FACTS

Rudolph and Ann Long Babcock were married in 1970. Their family included four children: Erika and Beth

Babcock, and Angela and Aryn Long. Ann was the natural mother of all four girls. Aryn and Angela ("the Long girls") were Ann's children form a prior marriage. Rudolph was the natural father of Erika and Beth ("the Babcock girls"). Ann committed suicide in 1978. All four children continued to live with Rudolph. He remarried, but the marriage lasted less than a year. Rudolph was apparently unable to care for the children alone, and in July 1981 the Louisiana Department of Health and Human Resources obtained an order of dependency which mandated removal of the children from Rudolph's care and custody. Following a four-day hearing, the Louisiana court ordered all four girls placed with Rudolph's parents, Willis and Elizabeth Babcock, who were residents of Richland, Washington. The Louisiana court ordered the Louisiana Department of Health and Human Resources to transfer the case to Washington. The girls arrived at the elder Babcocks' home in Washington about three weeks later. Rudolph also moved in with his parents.

On October 7, 1981, the Louisiana court ordered Rudolph to leave his parent's home and to reside apart from the girls. He did so, traveling to Wisconsin where he established a new residence. On the same date, the Louisiana court formally relinquished jurisdiction on condition that Washington accept jurisdiction of the case.

On November 5, 1981, the Washington DSHS requested and obtained from the Washington juvenile court an order by which Washington accepted jurisdiction. The Washington court order contained recitals that it was based on a finding of dependency having been made by the Louisiana court; a dispositional order having been entered by the Louisiana court placing the children with

the elder Babcocks in the State of Washington; appropriate interstate compact proceedings having been instituted by Louisiana; the Washington court's review of the case record to the date of its order; and the agreement of the parties.

Following Washington's acceptance of jurisdiction, a dependency disposition hearing was held in the Washington juvenile court on March 31, 1982. Rudolph Babcock obtained a continuance of the hearing as to the Babcock girls. The court entered a "temporary order" placing the Long girls in the home of Lee and Janet Michael, Janet Michael is the sister of the Long girl's natural mother, Ann Long Babcock.

Meanwhile, back in February 1982, Rudolph Babcock had removed the Babcock girls from his parents' home taking them to his new home in Wisconsin. A Wisconsin court granted full faith and credit to a Washington order of requisition and remanded the Babcock girls to the custody of the Washington DSHS. The Babcock girls returned to Washington on April 19, 1982. By that time the Long girls had been placed in the home of Lee and Janet Michael. Washington caseworker Mark Bronson, acting without a court order placed the Babcock girls there as well.

On May 4, 1982, a second hearing was held before the Washington juvenile court in the Long/Babcock girl's case. In her report, Wanda Tyler, a DSHS caseworker, recommended that all four girls remain with the Michaels. Rudolph objected to this recommendation, and the case was continued for further hearing. Pending the continuance, the court determined that the girls should remain with the Michaels.

The record indicates that several hearings were held thereafter as Rudolph Babcock continued his efforts to regain custody of his daughters. These efforts proved unsuccessful. As late as September 1983, the Washington DSHS reported that the girls were "fitting in very well" in the Michaels' home, and counselors who conducted psychological examinations were convinced that the girls were experiencing family stability. The Long and Babcock girls remained in the Michaels' home until October 1983, when it was discovered that Lee Michael had sexually abused all four girls, in addition to his own daughter. Lee Michael was arrested and subsequently convicted on three counts of statutory rape and two counts of indecent liberties. He is presently serving a 55-year sentence.[1]

In 1984, Rudolph Babcock, on behalf of himself and the two Babcock girls, and Angela Long, one of the Long girls, filed in the district court a civil rights action pursuant to 42 U.S.C. § 1983 against Washington DSHS caseworkers Wanda Tyler and Mark Bronson.[2] The plaintiffs alleged deprivation of their first amendment right of family association, violation of the children's fourteenth amendment liberty interests in being free from harm

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[1] After the departure of Lee Michael, the Long and Babcock girls asked to be allowed to continue living with Janet Michael. They were permitted to do so. In December 1983, following a successful home study, the two Babcock girls were returned to the custody of Rudolph, who had moved to Oklahoma. Aryn and Angela Long continued in the custody of Janet Michael until they reached the age of majority. *Babcock v. State*, 768 P.2d 481, 486 n.1 (Wash. 1989).

[2] The elder Babcocks, Willis and Elizabeth, the grandparents of the Babcock girls, initially joined in the lawsuit. Their claims, however, were dismissed with prejudice and are not involved in this appeal.

while in the state's custody, and violation of fourteenth amendment liberty interests which the plaintiffs claimed existed by virtue of Washington statutes that require the DSHS to provide family reunification services.[3]

JURISDICTION

In February 1986, defendants Tyler and Bronson filed a motion in the district court to dismiss the plaintiffs' complaint on the ground of absolute immunity. The district court denied the motion. Subsequently, we decided *Meyers* and *Coverdell*. In 1988, Tyler and Bronson moved for summary judgment. They contended they were entitled to absolute immunity, as well as qualified immunity.

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[3] The plaintiffs also included state claims in their complaint. These claims was dismissed by the district court and were pursued by the plaintiffs in Washington state court. In their state case, the plaintiffs alleged causes of action based on negligence, outrageous conduct, alienation of affection, and the violation of federal civil rights under color of state law, 42 U.S.C. § 1983. The Washington superior court granted summary judgment in favor of the defendants and dismissed all of the plaintiffs' claims. *Babcock v. State*, 768 P.2d 481, 486 (Wash. 1989). Because the section 1983 action was then pending in the federal district court, the plaintiffs did not appeal the state court's dismissal of it. *Id.* They did appeal the dismissal of the other claims. *Id.* The Supreme Court of Washington affirmed dismissal of the claims on the ground that the caseworkers were entitled to absolute immunity. *Id.*

Because we hold that the defendant caseworkers are entitled to absolute immunity under applicable Supreme Court and Ninth Circuit authority, we do not consider the separate question of whether the Washington Supreme Court's decision should be given preclusive effect on the issue of federal immunity in this section 1983 suit.

The district court ruled on the defendant's motion for summary judgment in its order dated January 11, 1988. In that order, it also reconsidered its earlier ruling by which it had denied the defendant court's reconsideration of its earlier order was prompted by our decisions in *Meyers* and *Coverdell*. The district court denied the defendants' motion for summary judgment, and refused to dismiss the case on the ground of absolute immunity.

Tyler and Bronson appeal from the district court's January 11, 1988 order. The plaintiffs move to dismiss the appeal on the ground that it is not timely as to the issue of absolute immunity, because, they contend, the 1986 order which initially denied the motion to dismiss is the order from which an appeal of the absolute immunity ruling should have been taken, and as to that order the appeal is untimely; and in any event, they argue of the January 11, 1988 order is an impermissible appeal from an interlocutory order.

We deny the motion to dismiss the appeal. In making its January 11, 1988 order, the district court reconsidered its earlier 1986 order and reached the merits of the case-workers' claim to absolute immunity. Reconsideration was appropriate in view of the intervening *Meyers* and *Coverdell* decisions as the district court discussed in its January 11, 1988 order. *See Kennedy v. LeFebvre*, 847 F.2d 482 (8th Cir. 1988). Having reconsidered the merits of the defendant's claim to absolute immunity, the district court rejected the defense, resolved the issue against the defendants, and denied the motion for summary judgment. Thus, the appeal from the January 11, 1988 order raises

the issue of the defendants' entitlement to absolute immunity, and the appeal is timely.[4]

With regard to the plaintiffs' argument that this appeal is not taken a final judgment, we agree this is the posture of the case. However, a district court's "denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). The plaintiffs argue that *Mitchell* permits an appeal from an interlocutory order denying absolute immunity only if the issue being appealed is a "purely legal" one.

In Mitchell, the Court stated that "A district court's denial of a claim of *qualified* immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell*, 472 U.S. at 530 (emphasis added). The Court placed no such limitation on an interlocutory appeal from an order denying *absolute*

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[4] Plaintiffs rely on *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1418 n.4 (9th Cir. 1984), in support of their contention that we can only review in this appeal "new matter" raised in the defendant caseworkers' 1988 motion. This reliance is misplaced. Without deciding whether the plaintiffs' characterization of *Sierra On-Line's* footnote 4 is correct, we note that there were intervening decisions from this circuit which caused the district court to reconsider it earlier order. Thus, there was "new matter" for the district court to consider, and it did so. This "new matter" was the effect of our *Meyers* and *Coverdell* decisions on the defendants' claim to absolute immunity, the very issue we consider in this appeal.

immunity. *See id.* at 525. Nevertheless, we do not have to resolve the question whether an appeal from an interlocutory order denying absolute immunity must relate only to a district court's determination of an issue of law. Here. there is no dispute that the children were the subjects of child dependency proceedings which began in Louisiana and were transferred pursuant to interstate compact to Washington. Nor is there any dispute that all of the defendant's actions of which the plaintiffs complain were taken during the course of the Washington child dependency proceedings. The question is whether, under facts which are not in dispute, or which may be conceded for purposes of this appeal, the defendants are entitled to absolute immunity. This is an issue of law.[5] *See United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir. 1984) (en banc).

It is well established that judges, advocates and witnesses enjoy the absolute immunity from liability for acts performed in judicial proceedings, "to assure that [they] can perform their respective functions without harassment or intimidation." *See Butz v. Economou*, 438 U.S. 478, 512 (1978). Similarly, prosecutorial immunity protects acts taken " 'in initiating a prosecution and in presenting the state's case.' " *Ashelman v. Pope*, 793 F.2d 1072, 1076 (9th Cir. 1986) (en banc) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976)). Prosecutorial immunity, like judicial immunity, is absolute rather than qualified in order to

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[5] Because we resolve this dispute on the basis of absolute immunity, we do not consider whether this court has appellate jurisdiction over the issue of qualified immunity or whether defendants were entitled to qualified immunity.

permit performance without fear of litigation. *Imbler*, 424 U.S. at 424.

Absolute immunity from liability under 42 U.S.C § 1983 has been accorded state employees responsible for the prosecution of child neglect and delinquency petitions, the guardian ad litem who serves as an advocate for the children in such proceedings, and psychologists and psychiatrists who provide information and findings for use in the proceedings by the State Department of Social Services, *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984). Such persons are accorded absolute immunity because their participation in the court proceedings is an integral part of the judicial process. *Id. See also Briscoe, v. LaHue*, 460 U.S. 325, 345-46 (police officer as witness). In contrast, police officers have been denied absolute immunity in their submission of affidavits in support of warrants on the theory that this function is too removed from the judicial process. *Malley v. Briggs*, 475 U.S. 335, 342 (1986). Thus, the crucial inquiry in resolving a claim of absolute immunity is whether the function for which immunity is claimed is so much an integral part of the judicial process that to deny immunity would disserve the broader public interest in having participants such as judges, advocates and witnesses perform their respective functions without fear of having to defend their actions in a civil lawsuit. *See Butz*, 438 U.S. at 512.

Applying this rationale, we have extended absolute prosecutorial immunity to social service caseworkers in initiating and pursuing child dependency proceedings, *Meyers v. Contra Costa County Dep't of Social Servs.*, 812 F.2d 1154, 1157 (9th Cir.), *cert. denied*, 108 S.Ct. 98 (1987), and in seeking and obtaining a court order for the seizure

and placement of a newborn child, *Coverdell v. Dep't of Social & Health Servs.*, 834 F.2d 758, 764 (9th Cir. 1987). We have also held that a child protective services worker who executes a court order for seizure and placement of a child is entitled to absolute quasi-judicial immunity. *Id.* at 765.

The plaintiffs argue that in contrast to the broad public policy underpinning the doctrine of absolute immunity, and our application of this policy in *Meyers* and *Coverdell*, the acts of the caseworkers in the present case exceeded the boundaries which limit the reach of absolute immunity. They contend that absolute immunity in the case now before us may only be extended to the initiation of dependency proceedings in Louisiana, not to any acts which occurred thereafter in Washington. They also assert that defendant caseworker Tyler conspired with Lee Michael to engineer a state court decision which placed the children in the custody of the Michaels. The plaintiffs further contend that Tyler and Bronson acted outside the scope of their protected functions when, without any court order, they took it upon themselves to make placement changes of the children.

It is undisputed that neither Tyler or Bronson participated in the initiation of the dependency proceedings. The proceedings were initiated in Louisiana. The girls were "adjudicated children in need of care [and] placed in the care and custody of the State of Louisiana, Department of Health and Human Resources" by order of the Louisiana court on September 3, 1981. The Louisiana court then placed the children with Willis and Elizabeth Babcock in Richland, Washington.

On November 5, 1981, the Washington court accepted jurisdiction over the girls "due to their current placement in the care of their paternal grandparents who reside in Benton County[, Washington]." From this point on, the DSHS Service Episode Record (the "SER"), in which the Washington caseworkers recorded their notes as the case progressed reveals numerous and extensive interviews with the Babcocks, the Michaels, the children and others. The SER also reflects visits by caseworkers to the Babcocks' and Michaels' homes to conduct home studies, and it shows that Tyler and Bronson gathered extensive information bearing upon placement of the children. The caseworkers also made recommendations for the placement of the children and testified in court on behalf of the DSHS.

The plaintiffs argue that Tyler's and Bronson's involvement in the case occurred during the "post-adjudication reunification phase of [the] dependency" proceedings. They characterize this involvement as consisting of "purely administrative or ministerial" acts performed by the caseworkers in connection with the supervision and placement of the children. And they contend such activity is not protected by absolute immunity. We disagree.

Dependency proceedings include post-adjudication activities as well as acts by which the proceedings are initiated. *See Meyers*, 812 F.2d at 1157. The reason for this is apparent. Caseworkers' duties do not end with the adjudication of child dependency. Depending on state law, caseworkers will have various statutory duties to perform during the time between the initial adjudication of dependency and final disposition of a case. *See* R.C.W. 13.34.120 (1983). In Washington, the dependency process

does not end until six months after the dependent child returns home. R.C.W. 13.34.130 (1983). Throughout this process, caseworkers need to exercise independent judgment in fulfilling their post-adjudication duties. The fear of financially devastating litigation would compromise caseworkers' judgment during this phase of the proceedings and would deprive the court of information it needs to make an informed decision, *Meyers*, 812 F.2d at 1157. There is little sense in granting immunity up through adjudication of dependency, and then, exposing caseworkers to liability for services performed in monitoring child placement and custody decisions pursuant to court orders. These post-adjudication actions by social caseworkers may or may not be prosecutorial in nature. *See Coverdell*, 834 F.2d at 764; *cf. Meyers*, 812 F.2d at 1156. In any event, however, all of Tyler's and Bronson's actions of which the plaintiff's complain were taken in connection with, and incident to, ongoing child dependency proceedings. Whether their immunity is characterized as quasi-prosecutorial or as quasi-judicial, *see Coverdell*, 834 F.2d at 765, Tyler and Bronson are entitled to absolute immunity.

The plaintiffs assert that Tyler should not be entitled to immunity because she conspired with Lee Michael to skew the DSHS recommendation in favor of the Michaels and to obtain a court order placing the children in the Michaels' home. We reject this contention. A social caseworker's entitlement to the defense of absolute immunity in the performance of her duties incident to child dependency proceedings cannot be defeated by allegations that the caseworker conspired with one of the parties to affect

the outcome of the case. The Supreme Court has recognized that with regard to prosecutors,

> [T]his immunity does leave the genuinely wronged defendant without civil redress [under section 1983] against the prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.

Imbler, 424 U.S. at 427-28. The performance of a social-worker's duty in child dependency proceedings is no less entitled to the protection of absolute immunity than is the performance of a prosecutor's duty in a criminal proceedings. *Coverdell*, 834 F.2d at 762-63. Their immunity must be absolute to permit them to perform their duties without fear of even the threat of section 1983 litigation. *Id.*

Plaintiffs also contend that even it Tyler and Bronson are entitled to immunity with regard to their placement recommendations, they should not be accorded immunity for two temporary placements of the children which they made without a court order.[6] These two instances of

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[6] During October 1981, Aryn Long ran away from the elder Babcocks' home twice. Following there incidents, Tyler placed Aryn in a licensed foster home under the supervision of Marilyn Wallace. Wallace was a secretary at the school attended by the girls. Angela Long asked to be placed in the Wallace home with his [sic] sister. Tyler acquiesced, and in December 1981, Angela also was placed in the Wallace foster home. This was a temporary placement until the Long girls

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placement, however, do not affect the result in this case. Tyler's temporary placement of the Long girls in a licensed foster home without a court order did not result in any harm. Bronston's temporary placement of the Babcock girls in the Michaels' home in April 1982 without a court order did not result in any harm during the period of that temporary placement; the sexual abuse occurred after the Washington juvenile court made its order in May 1982 confirming Bronson's placement of the children with the Michaels.

CONCLUSION

Defendant's Tyler and Bronson are entitled to absolute immunity. As we have previously stated, "the policies in support of immunity can only be fulfilled if immunity is freely granted and the exceptions are few and narrowly drawn." *Ashelman*, 793 F.2d at 1079. This case meets the criteria for the application of the doctrine of absolute immunity as articulated by us in *Meyers v. Contra Costa County Dep't of Social Servs.*, 812 F.2d 1154

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were placed in the Michael's home as a result of the March 31, 1982 Washington Juvenile Court hearing. At the time this hearing, the Babcock girls were in Washington. The temporary order for placement of the Long girls in the Michaels' home did not extend to the Babcock girls; their placement was deferred pending a continuance of their case for further hearing. The Babcock girls returned from Wisconsin to Washington in April 1982, and, without a court order, the defendant Bronson placed them in the Michaels' home with the Long girls. This was a temporary placement which was confirmed by the juvenile court by an order made at a hearing held May 4, 1982.

(9th Cir.), *cert. denied*, 108 S.Ct. 98 (1987), and *Coverdell v. Dep't of Social and Health Servs.*, 834 F.2d 758 (9th Cir. 1987).

REVERSED and **REMANDED** with instructions to dismiss the action.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RUDOLPH BABCOCK, et al., Plaintiffs, vs. WANDA TYLER, et al., Defendants.	NO. C-84-271-SPM ORDER (Filed Jan. 11, 1988)

BEFORE THE COURT are plaintiff's Motion for Partial Summary Judgment (Ct. Rec. 287) and defendant's Motion for Summary Judgment (Ct. Rec. 285). A hearing was held on November 24, 1987. Michael R. Seidl and Robert J. Crotty appeared for plaintiffs; Owen F. Clarke, Jr. and Michael E. Grant represented defendants. The court makes the following rulings based upon the original and supplemental briefing by the parties and the oral arguments of counsel. The factual basis of this suit has been related by this court in previous orders and will be discussed here as relevant to the various legal issues.

A. Protection Claim

In their Motion for Partial Summary Judgment, plaintiffs Angela (Long) Frederiksen, Beth and Erika Babcock (the girls) contend that because they had been placed with the Michaels as the result of State action, defendants, as State actors, owed them a duty of adequate protection such as afforded to prisoners. The incarceration claims arise under the Eighth Amendment's prohibition of cruel and unusual punishment. Estelle v. Gamble, 429 U.S. 97 (1976). The Estelle-type claim has been

extended under Fourteenth Amendment auspices to instances of a "special relationship" between the state actors and the plaintiffs. A child who is a ward of the State has been held to possess such a protected right to be free from foreseeable injury. Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987); Doe v. New York City Dept. of Soc. Servs., (Doe I), 649 F.2d 134 (2d Cir. 1981). Defendants do not respond to this portion of plaintiffs' motion, but it seems clear that the girls have a protected right to be free from the type of harm which befell them here. The crucial question, however, is whether defendants' actions were the legal cause of the injury suffered by the girls.

The issue then becomes what level of conduct is required to hold defendants liable. Plaintiffs assert that they must show defendants acted with deliberate indifference to plaintiffs' safety. Such is the standard under the Eighth Amendment and that applied by the Taylor court to the county officials charged with failing to protect a foster child from abuse by the foster mother. 818 F.2d at 795. See Doe I, supra. However, in Doe v. New York City Dept. of Soc. Servs. (Doe II), 709 F.2d 782, 789 (2d Cir. 1983), the court discussed whether the standard announced in Youngberg v. Romeo, 457 U.S. 307 (1982), which was decided subsequent to Doe I, was applicable to claims of inadequate protection by a caseworker. In Youngberg, a case dealing with an involuntarily committed retarded adult, the court held that a professional's decision would be presumed correct and liability could be found only by demonstrating that the decision was such a "substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision

on such a judgment." Id. at 323. The court held that the lower courts erred in applying the Eighth Amendment standard to that factual situation. Id. at 325. The Doe II court interpreted the Youngberg standard to be one of gross negligence. 709 F.2d at 790. Rather than deciding the exact nature of the standard, the court reasoned that even if the Youngberg decision did apply outside of an institutional setting, the deliberate indifference standard, which was satisfied in Doe I, may have been more stringent, and thus refused to reconsider its prior decision. Id.

The only Ninth Circuit case in this general area discusses both the deliberate indifference and the Youngberg professional judgment standards, without recognizing or resolving any apparent conflict between them. Gibson v. Merced Cy. Dept. of Human Resources, 799 F.2d 582 (9th Cir. 1986). Plaintiff there brought a claim against the county under 42 U.S.C. § 1983 alleging that her removal from a foster home had adversely affected her medical condition. The court assumed, without deciding, that a foster child has a right to be free from the arbitrary infliction of harm by the state, but found that the county had not acted with deliberate indifference to her medical needs. Id. at 589. The court further found, however, that the county's decision to remove plaintiff also did not violate her constitutional rights under the Youngberg analysis. Id. at 590.

In the present case, it seems that the factual trigger of the protection claim is the defendants' failure to adequately investigate Lee Michael's criminal history. Under either the Estelle or Youngblood standard, the court concludes that neither side is entitled to summary judgment on the question of whether defendants' actions were of

such a character to violate plaintiffs' constitutional rights. This court cannot conclude as a matter of law that defendants exhibited deliberate indifference or acted in substantial departure from professional standards. In light of evidence that criminal checks were run on other temporary custodians and other evidence, the court does find that a reasonable jury could conclude that the failure to investigate the criminal background of a foster parent could give rise to a constitutional violation. Plaintiffs' and defendants' motions for summary judgment are DENIED in regard to this claim.

B. Roth Due Process Claim

Plaintiffs contend that the girls and Rudy Babcock have a state-created liberty interest in the protections and procedures embodied in the Washington child custody laws. In Board of Regents v. Roth, 408 U.S. 564 (1972), the Supreme Court recognized that an individual may have a federally protected right to benefits conferred under state law. The Eleventh Circuit utilized this theory to find that a foster child had a protected due process liberty interest in services and safeguards established by Georgia child welfare laws. Taylor, supra, 818 F.2d at 794.

The central issue in determining whether a state law creates a federally protected interest is whether the language is mandatory in nature so as to create a reasonable expectation of entitlement to the interest. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979); Allen v. Board of Pardons, 792 F.2d 1404 (9th Cir. 1986). A review of the Washington dependency statutes demonstrates that the agency charged with the

care of a dependent child is required to provide certain services in furtherance of certain specified goals.

In the introductory provision of the statutes, the following legislative policy is found:

> The legislature declares that the family unit is a fundamental resource of American life which should be nurtured. Toward the continuance of this principle, the legislature declares that the family unit should remain intact in the absence of compelling evidence to the contrary.

RCW 13.34.020. In keeping with this policy, upon removal of a child from his or her home, the agency charged with the child's care "*shall* provide the court with a specific plan as to where the child will be placed, what steps will be taken to return the child home, and what actions the agency will take to maintain parent-child ties." RCW 13.34.130(2). "This plan *shall* specify what services will be offered to the parent and what requirements must be met in order to facilitate resumption of custody by the parent." RCW 13.34.130(2) (a). "Such services shall actually be provided to the parent and maximum parent-child contact is to be encouraged." RCW 13.34.130(2) (b) (c). (All emphasis added.) The repeated use of the word "shall" clearly shows the mandatory nature of the agency's actions. Accordingly, plaintiffs had a "legitimate claim of entitlement" to the services and process established in the Washington dependency statutes. See Roth, supra, 408 U.S. at 577.

Mr. Babcock is the natural father of Erika and Beth. He is the step-father of Angela, and although he raised

her for several years, he never established a legal relationship with Angela. The Washington dependency statutes delineate the rights of a "parent" in those proceedings. The word "parent" for purposes of Chapter 13.34 means the biological or adoptive parents of a child. RCW 13.04.011. Accordingly, Mr. Babcock does not have a state created right to his association with his step-daughter, Angela. Nonetheless, this court previously recognized that Mr. Babcock has a clearly established right under the First Amendment to familial relationship with his natural daughters and with Angela (Ct. Rec. 238). Thus, this court must determine whether defendants' actions violated the Washington statutory scheme and/or also impermissibly interfered with Mr. Babcock's First Amendment rights.

1. Transfer of Jurisdiction.

Plaintiffs protest the transfer of jurisdiction over the girls from Louisiana to Washington without notice or hearing. The transfer occurred pursuant to the Interstate Compact on Placement of Children (ICPC). RCW 26.34 (Ct. Rec. 289, App. A). Plaintiffs contend that in order for Washington to accept jurisdiction over the girls' placement, a dependency petition must be filed and that the caseworkers are responsible for initiating such proceedings.

In support of their theory, plaintiffs cite to Chapter 30 of Manual G, a manual of Department of Social & Health Services (DSHS) regulations, which relates to the ICPC (Ct. Rec. 139, Ex. 9). Plaintiffs contend that these regulations mandate that Washington may assume jurisdiction under the ICPC only by the initiation of a dependency

proceeding. The regulations, however, are notably silent on the method for asserting jurisdiction over a dependency-type situation initiated in another state. The only mention of such is in § 30.98, which states:

> The service worker may confer or coordinate with:
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> A. Juvenile courts to:
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> . . .
>
> 2. Establish court jurisdiction of a child (e.g. dependency petition, Chapter 23).

(Ct. Rec. 139, Ex. 9, p. 5). Neither the statutes regarding the ICPC, RCW 26.34 (Ct. Rec. 289, App. A) or that relating to dependency proceedings, RCW 13.34 (Ct. Rec. 289, App. B) specify the procedure for transferring jurisdiction from the sending state (Louisiana) to the receiving state (Washington). Because there is no clearly-defined process which is required for such a transfer, this court concludes that plaintiffs do not have a state created interest in receiving notice of such an intent to transfer jurisdiction. Accordingly, any involvement by defendants in obtaining the *ex parte* order transferring jurisdiction on November 5, 1981 (Ct. Rec. 139, Ex. 7) could not be the basis of liability against them.

The court also concludes that this transfer of jurisdiction did not impinge upon plaintiffs' First Amendment right. The interruption of the familial relationship already had occurred and the Benton County order merely changed the supervising court. The court DENIES plaintiffs' motion for summary judgment as it relates to the

transfer of jurisdiction, but GRANTS defendants' motion as it relates to the same.

2. Removal of the Girls From the Home of Willis and Elizabeth Babcock.

In its oral ruling, the Louisiana court placed the girls with the Louisiana Office of Human Development and directed it to transfer the custody of the children to the equivalent agency in Washington for placement with the grandparents (Ct. Rec. 136, Ex. C, p. 490-91). This oral ruling, however, was not presented to the Benton County court until sometime subsequent to that court's acceptance of jurisdiction. The written order from the Louisiana court transferring jurisdiction makes no mention of placement with either the Babcocks or any state agency (Ct. Rec. 139, Ex. 6). No mention of the placement was made during the Benton County hearing regarding the jurisdictional transfer (Ct. Rec. 136, Ex.D, Vol. I, p. 4).

Benton County accepted jurisdiction based in part on the Louisiana order placing the children with the paternal grandparents, who resided in that county, and on its statement that the parties agreed to that placement (Ct. Rec. 139, Ex. 7). The order further stated that the court accepted jurisdiction due to the girls' current placement with the elder Babcocks.

In fact, however, on November 5, 1981, when the Benton County order was signed, Aryn Long was no longer residing with the Babcocks. Because that fact was not stated in the Benton County order and had apparently never been brought to the court's attention, defendant Taylor and other caseworker determined that a copy

of the Benton County order would not be distributed to the families (Ct. Rec. 289, Ex. 32).

Defendants contend that the girls were under the care, custody and control of DSHS and not the senior Babcocks, and thus defendants did not need to notify anyone or obtain a court order prior to changing the girls' placement. Defendants cite two cases in support of their theory that no notice was necessary in this situation. The first case, In re Lowe, 89 Wn.2d 824, 576 P.2d 65 (1978), involved a delinquent youth committed to the care of DSHS under RCW 13.04. In that case, the juvenile court had ordered that the minor not be transferred from one institution to another without prior court approval. The court remanded the action to the juvenile court, stating:

> Thus, the juvenile court in committing a juvenile to the department may not prescribe requirements that must be followed by department, except that it may direct that it receive notice in advance of specified action by department. In this case, the court might properly have required notice of the intended placement decision.

Id. at 827.

The Court of Appeals in In re Gakin, 22 Wn. App. 822, 592 P.2d 670 (1979) extended the reasoning of the Lowe court from delinquencies to dependencies. In ruling that the juvenile court could not order DSHS to provide a dependent minor with specific types of treatment in a specific facility, the Gakin court cited the language in Lowe which provided that following commitment of a juvenile to the care and custody of the department, the juvenile court's jurisdiction is limited to: (1) revoking or

modifying its order of commitment, or "(2) upon proper petition and hearing, modify[ing] or set[ting] aside department's decision on placement or transfer of the juvenile." Id. at 824 (quoting Lowe, 89 Wn.2d at 827.)

Both of the above cases cite to RCW 13.04.095, which defined the power of the court to commit a delinquent or dependent child to DSHS. That statute was repealed effective July 1, 1978. Also, in 1978 the statute governing modification of court orders was amended and recodified. The current statute provides: "Any order made by the court in the case of a dependent child may at any time be changed, modified or set aside, as to the judge may seem meet and proper." RCW 13.34.150. Additionally, the statute which gives the parent the right to participate and be represented "at all stages of a proceeding in which a child is alleged to be dependent" became effective in July 1978. RCW 13.34.090.

RCW 13.34.130 controls the court's options in order a disposition of a child found to be dependent. In regard to the present situation where the girls were to be removed from their home, the court could have ordered them into the care, custody and control of (1) a relative; (2) DSHS; (3) a licensed child-placing agency; or (4) a home not required to be licensed. RCW 13.34.130(1)(b). The Benton County court accepted jurisdiction over these girls based upon their current placement with their paternal grandparents, who were residing in Benton County (Ct. Rec. 139, Ex. 7). The court did not order them into the care, custody and control of DSHS with placement in the grandparents' home, but rather referred only to the

grandparents. In fact, other than the notice of presentment signed by a DSHS attorney, the agency is not mentioned at all in the court's order.

A review of the Washington and Louisiana statutory schemes shows that the Louisiana finding of "in need of care" is closely akin to a Washington dependency determination. Pursuant to the "in need of care" decision, the Louisiana court orally placed the girls in the care of that state's agency which is equivalent to the Washington DSHS, with placement at the home of the grandparents. It was the jurisdiction over that placement which was transferred to Washington. However, the record reveals that the Benton County court had not seen a copy of the Louisiana court's oral ruling on this matter, but, rather, had only that court's written order which made no mention of the agency or its custody. Thus, at this time a factual issue remains regarding whether the girls were placed under the care, custody and control of DSHS.

If the girls were placed with DSHS, it is this court's impression, but not ruling, that they could be removed from the Babcocks' without notice. If they were not, however, DSHS could obtain care, custody and control of the girls only by obtaining an order modifying the previous order which states that the girls are placed with their grandparents. Because no such modification had been obtained at the time Erika and Beth were removed or at any subsequent time, the defendants would have no authority to remove the girls from the senior Babcocks' care. Because of the remaining factual disputes, the court DENIES both plaintiffs' and defendants' motions for summary judgment as to the removal of Erika and Beth.

In regard to Angela, however, as stated above, Mr. Babcock does not have a state created liberty interest and, thus, may not complain about statutory violations related to her removal. Because Angela already had been removed from Mr. Babcock's custody, the court does not find that changing her from one foster care placement to another without notice and hearing violated Mr. Babcock's First Amendment rights. Mr. Babcock has not shown that he had less access to his step-daughter once she was removed from his parents' home. Accordingly, defendants' motion as it relates to Mr. Babcock's claims on Angela's removal, is GRANTED, and Mr. Babcock's motion is DENIED. Angela, however, would be covered by the statute and, thus, would be protected by the statute. In light of the factual questions discussed above, both Angela and defendants' motions are DENIED in regard to her removal.

3. Placement Decisions.

Plaintiffs contend they were entitled to an evidentiary hearing similar to that held in Louisiana prior to placement of the girls with the Michaels. Although the court finds that the Benton County court was not required to relitigate the issue of the girls' dependency, the court does conclude that certain processes were required throughout the handling of this matter.

Once jurisdiction was established in Washington, plaintiffs had a protected right in obtaining the services due them under the Washington dependency statutes. In essence, it is this alleged failure to follow the statutory mandates which most deeply troubles plaintiffs. As noted

above, the Legislature found that the primary purpose of the dependency statutes was to preserve the family unit. The statutes repeatedly refer to the duties of the agency charged with the care of the minor to work toward reunification of that entity. In order to achieve the goal, the law provides that the caseworker shall devise a plan and set forth requirements which lead to the eventual placement of the child with the parent, if such is possible.

A review of the Service Episode Record (SER) reveals evidence that could support a finding that the present defendants were not always working toward this statutory goal. The Louisiana court, after several days of testimony, concluded that reunification of the family would be difficult if the children were placed with the Michaels, in light of the hostility evident between the father, Rudy Babcock, and the Michaels. Thus, the girls were ordered into the care, custody and control of the Louisiana social agency with physical placement in the senior Babcocks' home. On August 20, 1981, in the initial intake in Washington by DSHS caseworker Jan Palmer, there is a notation regarding a phone call from a Louisiana caseworker in which that caseworker indicated she recommended that the children be placed with the Michaels (Ct. Rec. 136, Ex. B, p. 1).

The first recording of an individual service plan was made by defendant Tyler in September 1981. Defendant there noted that a complete home study should be done on both the senior Babcocks' and the Michaels' homes (Ct. Rec. 136, Ex. B, p. 5). Throughout the rest of the record, virtually every entry has some connection to the Michaels. Moreover, it is clear from these entries that

defendants were or should have been aware of the antagonism between Rudy Babcock and the Michaels. The caseworkers supported the Michaels in their attempts to contact the girls and, in fact, on occasion, counseled the girls that they should not tell their grandparents or their father of their communication with the Michaels.

Little mention is found in the SER of what steps were being taken to reunite the girls with their father. The court acknowledges that Rudy Babcock's absence from the local area may have burdened defendants' ability to provide services to him, but defendants have failed to point the court to any evidence that they were attempting to achieve the statutory goal of preserving the family unit.

Although this court cannot conclude as a matter of law that defendants' actions exhibited deliberate indifference toward the girls and Mr. Babcock's constitutionally protected rights to reunification services, it does conclude that a genuine question of fact exists regarding whether defendants were so violative as to allow this issue to go to a jury. Moreover, the court finds that even though Mr. Babcock was not entitled to these statutory benefits in regard to Angela, there is a material issue of fact regarding whether defendants' actions represented deliberate indifference to his fundamental right of protection of the family unit. Both parties' motions for summary judgment are DENIED as to this ground.

4. Creation of Michael Guardianship.

This guardianship was created only as to Angela. Because Mr. Babcock does not fit into the statutory definition of a parent, he cannot claim entitlement to the process set forth in the guardianship provisions. RCW 13.34.230-.236. The court must determine, however, whether the defendants' actions were violative of his fundamental familial rights.

Mr. Babcock contends he did not receive notice of a guardianship hearing. A review of the Benton County transcript, however, reveals that Mr. Babcock and his attorney were present at the dependency review hearing when evidence was taken and arguments were made regarding the Michael guardianship (Ct. Rec. 136, Ex.D, Vol. 1, pp. 48-165). At that hearing, Mr. Babcock and his attorney fully participated by cross-examining, calling their own witnesses and presenting argument. Whether or not this hearing was formally designated as a guardianship hearing, it is clear that Mr. Babcock was given amply opportunity to contest the guardianship prior to its establishment. Mr. Babcock is not entitled to summary judgment on this basis, but, rather, such should be entered for defendants.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendants' Motion for Summary Judgment presents five separate issues. The first three have some cross-relationship and will be set forth initially:

1. The Benton County Superior Court's rulings as to state law claims, and as to the lack of requisite intent or deliberate indifference necessary to show violations of civil rights, are *res judicata*.

2. The Benton County Superior Court was correct in ruling that plaintiffs failed to show the requisite intent or deliberate indifference necessary to maintain a civil rights action against defendants Tyler and Bronson.

3. The plaintiffs' constitutional claims are for violations of procedural due process, subject to the limitations of Daniels and Davidson.

As to 1, this court has previously decided, in an opinion and order filed April 20, 1987 (Ct. Rec. 272) that since plaintiffs did not freely and without reservation elect to litigate fully the federal issues in state court, they have a right to return to federal court on the federal issues. The court relied principally upon Colorado River Waver [sic] Conservation Dist. v. United States, 424 U.S. 800 (1976), and Tovar v. Billmeyer, 609 F.2d 12391 [sic] (9th Cir. 1980). This would logically include determination of all elements and issues of the federal litigation. It would be an empty right to be able to return to federal court if the state court's ruling on state issues controlled the decisions of the federal court on federal issues. The state court rulings on state claims are, of course, entitled to *res judicata* effect.

The issue of whether return to federal court is permissible is a close one, since plaintiffs filed a complaint in state court which included these federal claims. It can be argued that this constituted a voluntary election to fully

litigate the federal issues in state court. However, plaintiffs later vacations as set forth in the Order Granting Plaintiffs' Motion to Lift Stay in Proceedings (supra, p. 3, 4, 5) seem to the court to show clearly an intent and purpose to litigate all federal questions in federal court. That, the court believes, is sufficient to bar preclusive effect to the state court decision.

The court concludes that there is evidence in the record from which a trier of fact could determine that the acts or omissions of which plaintiffs claim, were performed either intentionally or with deliberate indifference to known rights. The court is not bound, as to these federal claims, by any conclusion of the state court that nothing more than negligence can be involved in these claims. Further evidentiary hearing gives the court an opportunity to determine precisely the nature and sources of the claims, now a matter of serious dispute between the parties.

The issue presented in 2, above, whether the Benton County Court was correct in its rulings as to the existence of intent or deliberate indifference as to state claims, does not concern this court. It has no appellate function as to the state claims, and as indicated earlier, concludes that it is not bound by any state court decisions on the elements of the federal claims.

As the court has mentioned in previous opinions in this case, in a § 1983 action in federal court, collateral estoppel or *res judicata* effect will not be given to a state court conclusion where the complaining party did not have full and fair opportunity to litigate a claim in state court or where the state court demonstrated inability or

unwillingness to protect federal rights. Haring v. Prosise, 462 U.S. 306 (1983). As plaintiffs have urged, if this court did not apply England, supra, this would require a full hearing as to the adequacy of plaintiffs' opportunity to litigate their claims in state court and as to the state court's willingness to protect federal rights. While a federal court must face this disagreeable task if the facts require it, this court's application of the England exception to *res judicata* makes it unnecessary here.

In 3, above, defendants urge that the doctrines of Daniels v. Williams, 474 U.S. 327 (1986) and Davidson v. Cannon, 474 U.S. 344 (1986), hold that the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty or property. Defendants assert that plaintiffs' constitutional claims are for procedural due process, subject to the limitations of Daniels and Davidson. Plaintiffs vehemently dispute this. It is not necessary to decide this controversy in advance of trial, because the court has already determined that the nature of defendants' conduct (whether negligent, intentional, deliberately indifferent or none of these) will be decided during the course of the federal litigation. This issue can be raised again at an appropriate time during the trial.

Defendants' next issue is:

4. Even if an actionable civil rights claim existed, plaintiffs have failed to raise any facts which would deprive defendants Tyler and Bronson of immunity.

The court has previously decided 12(b)(6) motions raising the issues of absolute and qualified immunity.

Defendants now move for summary judgment, claiming the undisputed facts support their motion.

ABSOLUTE IMMUNITY

In this court's Order Partially Granting and Partially Denying Defendants' Motions for Dismissal, filed February 13, 1986 (Ct. Rec. 128), this court declined to hold social workers absolutely immune for functions other than prosecutorial, which it considered to be removing children from homes, filing petitions charging child abuse or neglect, and testifying in such cases. Of course, actions taken by social workers under court order would also be absolutely immune.

Later decisions of the Court of Appeals for the Ninth Circuit have been to the effect that "social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings." Meyers v. Contra Costa County Dept. of Soc. Servs., 812 F.2d 1154 (9th Cir. 1987); Coverdell v. Department of Soc. & Health Servs., No. 86-3825 (9th Cir., slip op. filed December 15, 1987). In this case, there will be evidence of numerous acts or failures to act by defendants not within the above framework, and claimed by plaintiffs to constitute constitutional violations. As to the non-prosecutorial functions, defendants are not entitled to absolute immunity.

The court confesses some concern in this area. Under the later cases, absolute immunity relates to dependency proceedings, broader in scope than child abuse or

neglect. Also, absolute immunity attaches to quasi-prosecutorial functions connected with the initiation and *pursuit* or dependency proceedings.

While no dependency proceedings were instituted in the state of Washington, it would appear the Louisiana proceedings were the functional equivalent of Washington's dependency proceedings. Upon transfer of jurisdiction, the children plaintiffs may have had the status of dependent children, even though the relevant regulations had not been followed. However, it remains to be determined what actions of defendants were in *pursuit* of dependency proceedings and which were quasi-prosecutorial in character. The court will welcome further discussion of this issue after precise evidence is on the record.

QUALIFIED IMMUNITY

The court believes that defendants' claim of qualified immunity is a reargument of the earlier motion considered and denied by this court in February 1986 (Ct. Rec. 129). The law has not changed. The additional allegations of fact by defendants are as to consultations with counsel before certain actions complained of by plaintiffs. These facts do not, in the view of the court, require a grant of qualified immunity. The specific evidence as to advice of counsel is, of course, relevant to the issue. It will be considered during trial, along with all other relevant testimony. Defendants are not entitled to qualified immunity as a matter of law.

Next, defendants argue:

5. Plaintiffs are collaterally estopped from alleging that removal of the children from Willis and Elizabeth Babcock's home and placement in the Lee Michael home was wrongful.

The court expresses its general agreement with the position taken by plaintiffs in their memorandum in opposition on this issue. We do not have complete transcripts of the prior actions. More important, the specific issues of fact and law claimed to be adjudicated have not been specifically laid out, and the review hearings were for the limited statutory purpose of determining whether court supervision should continue. There was no final decision on the merits; finally, this court would be extremely reluctant to apply collateral estoppel in advance of trial where a basic aspect of plaintiffs' allegations is that they did not have a full and fair opportunity to litigate in the state court.

CONCLUSION

Plaintiffs' motion for summary judgment is DENIED. Defendants' motion for summary judgment is GRANTED in the following respects:

1. Plaintiffs' claims regarding transfer of jurisdiction are DISMISSED WITH PREJUDICE.

2. Mr. Babcock's claims regarding removal of Angela from the elder Babcocks' home is DISMISSED WITH PREJUDICE.

3. Plaintiffs' claims regarding creation of the Michaels guardianship are DISMISSED WITH PREJUDICE.

Defendants' motion for summary judgment is DENIED in all other respects.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

NO. 89-912

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1989

BETH BABCOCK, by and through her guardian; ERIKA BABCOCK; and ANGELA LONG,

Petitioners,

v.

WANDA TYLER and MARK BRONSON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

NO. 89-912

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I. LIST OF PARTIES

Petitioners' List of Parties is confusing in that it lists individuals who are no longer parties in the case and are not before this Court, and fails to identify Rudolph Babcock, who was a party before the court below, as a petitioner in his individual capacity. The claims of Willis and Elizabeth Babcock were dismissed with prejudice in February, 1986, and Arthur J. Bieker was voluntarily dismissed as a defendant later that year. Defendant Lee Edward Michael offered no defense and an Order of Default was entered against him in 1988. The only parties to the interlocutory proceeding in the Ninth Circuit Court of Appeals were:

Petitioners:
Rudolph Babcock.
Beth Babcock, by and through Rudolph Babcock, her father and guardian.
Erika Babcock.
Angela Long.

Respondents:
Wanda Tyler.
Mark Bronson.

II. STATEMENT OF THE CASE

A. Nature Of Petitioners' Claim

The issue in this Petition for Certiorari is whether Washington Department of Social and Health Services (DSHS) caseworkers are entitled to absolute immunity in connection with the performance of their statutory duties in child dependency proceedings. Those duties included a placement recommendation to a court which resulted in that court's placement of four children in the home of a relative where they were sexually abused.

The District Court below denied defendants' motion for summary judgment on absolute and qualified immunity grounds. Defendants appealed to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1291, and the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), as elaborated in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Reversing the District Court, the Ninth Circuit Court of Appeals held that the caseworkers are entitled to absolute immunity and remanded with instructions to dismiss. *Babcock v. Tyler*, 884 F.2d 497, 504 (9th Cir. 1989). Petitioners seek review of that decision.

B. Counterstatement Of The Facts

Petitioners' selective recitation of the facts in their Statement Of The Case presents a misleading picture of the

record that was before the Court of Appeals. This counter-statement corrects the pertinent inaccuracies and omissions contained in Petitioners' Statement Of The Case.

Initially, it should be understood that the Petitioners were not in "foster care" under Washington law. The girls were placed by the juvenile court in the care of their deceased mother's sister and her husband. Important distinctions exist under the Washington dependency statute between foster care and placement with relatives. At the time the Petitioners were placed in the Michael home, Washington law required that pre-placement criminal background checks be conducted on prospective foster parents, but specifically excluded relatives from that requirement. Laws of 1967, ch. 172 § 3.[1] Washington dependency law at that time, and still, lists relatives as the first order of preference for placement of children. Laws of 1979, ch. 155 § 46; Laws of 1988, ch. 189 § 2. By using the generic term "foster care" Petitioners divert the Court's attention from the fact that the Respondents and the juvenile court were operating under a statutory scheme that establishes certain placement criteria and procedures as a matter of state policy.

The assertion in the Petition that the District Court held that a jury could have determined that the abuse could have been avoided entirely if the caseworkers had simply checked Michael's criminal record, is false. (Pet., App. 21)

A pointed illustration of the selectivity with which Petitioners have presented the facts is found in their description of Lee Edward Michael's "criminal record." Petitioners have failed to identify any conviction records that would have been accessible to a Washington caseworker. But even more misleading is Petitioners' failure to inform the Court that the rape charge against Michael resulted in acquittal by a jury after a trial, and that the later allegation of sexual assault

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[1]The dependency statute was amended in 1984 to include relatives within the investigation requirement for the first time. Laws of 1984, ch. 188 § 5. In 1988, the legislature again amended the statute, liberalizing the requirement for investigation of relatives. Under current law, if a child is placed with a relative, the criminal history background check need not be completed before placement. Laws of 1988, ch. 189 § 3.

was a complaint following an altercation with a woman friend that was never criminally charged. The assertion that Respondent Tyler "failed to check records which were readily available . . . and which would have revealed Michael's criminal history" is not supported even by Petitioners' own record citation. (Pet. 3)

Petitioners' failure to disclose these facts becomes significant in the light of the Washington statutes by which Respondents were constrained. The Washington Criminal Records Privacy Act permitted access to conviction records only. Laws of 1977, ch. 314 § 5. At the time Wanda Tyler conducted the home study prior to recommending placement of Petitioners with their aunt and uncle, not only was no criminal record check required under Washington law, but also there were no criminal convictions against Michael for sex crimes.

It is well established in the record below that the form used by Respondent Tyler in conducting the homestudy interview of Janet and Lee Edward Michael was not "the questionnaire that she and all other workers in the agency used," as represented by Petitioners. (Pet. 3) In fact, it was an adoption questionnaire that she used as a checklist on that particular occasion. (CR 305, Ex. B, Vol. IV, 119-20)

Petitioners seriously skew the facts when they state that Tyler "placed the children in Michael's home even though she did not license Michael as a foster parent." (Pet. 3) The Michael home was a relative placement, and therefore, not subject to foster home licensing. Moreover, Tyler never placed any of the children in the Michael home. They were placed there by the juvenile court only after hearings attended by all parties and their counsel. The placement decisions were made by the juvenile court according to Washington dependency law and procedure. (CR 305, Ex. D, Vol. I, 15, 23, 37)

C. **Correction of Petitioners' Procedural Statements**

Two matters regarding the litigation commenced by Petitioners for damages arising from Lee Edward Michael's

criminal acts require clarification. First, the Petition states that "Petitioners commenced this damage action under 42 U.S.C. § 1983 in March, 1984, in the United States District Court for the Eastern District of Washington." (Pet. 7) That is true. However, Petitioners neglect to mention that at the same time they commenced an action in the state court in Washington, asserting the same section 1983 claims as well as state tort law claims. In October, 1986, all of Petitioners' claims, including those under section 1983, were dismissed on immunity grounds by the state trial court on Respondents' motion for summary judgment.

Respondents appealed the dismissal of their state law claims to the Washington Supreme Court, but returned to federal court to pursue their section 1983 claims based on this Court's holding in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). On March 1, 1989, the Washington Supreme Court affirmed the summary judgment:

> [W]e hold that caseworkers carrying out their statutory duties in connection with dependency proceedings under RCW 13.34 are entitled to immunity from subsequent suit, on the ground that such immunity is required to preserve the integrity of [the] adversarial process.[2]

Babcock v. State, 112 Wn.2d 83, 103, 768 P.2d 481, 492, reh'g granted, 113 Wn.2d ff 1104 (1989). (Appendix)

The second procedural matter that requires correction is Petitioners' representation that the interlocutory appeal to the Ninth Circuit in this case was limited to the issue of absolute immunity. The appeal was based on Respondents' assertion of both absolute and qualified immunity. Qualified immunity was extensively briefed and supported by the rec-

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[2]A dissenting opinion by Utter, J., concurred in by two other justices, stated that the caseworkers (Respondents herein) "were not liable . . .; they were only following agency procedures." 112 Wn.2d at 114, 768 P.2d at 497. The dissent focused on whether the agency should be accorded the same immunity to which its caseworkers were entitled.

The Washington Supreme Court has granted reconsideration of its decision, specifically requesting additional argument on DSHS discretionary function immunity. The court's decision has not yet been announced.

ord. However, the court decided the case on absolute immunity as did the Washington Supreme Court.

Petitioners have sought to get this Court's attention through misstatement and omission of facts, rather than the merits of their legal argument. But, as will be demonstrated with the true facts in view, the Petition does not merit granting a Writ of Certiorari.

III. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *MALLEY v. BRIGGS*

Petitioners' effort to analogize Respondents' role in the dependency proceedings to that of the police officer in *Malley v. Briggs*, 475 U.S. 335 (1986) ignores important factual differences in those two situations.

A caseworker's statutory duties under RCW 13.34 are as intimately associated with the judicial phase of dependency cases as are the duties of a prosecutor in a criminal case. The judicial process begins with the filing of a dependency petition and does not end until six months after the child has returned home. RCW 13.34.130. The procedures established for dependency cases by Washington law often place caseworkers in adversarial roles *vis a vis* parents and other family members, as is well illustrated by the juvenile court proceedings actually conducted in this case. Throughout those proceedings, the parties were represented by attorneys; they had a full opportunity to introduce evidence, examine witnesses, and argue to the court, and those opportunities were fully exploited. The major point of contention was whether the children should be placed in the Michael home. "The proceedings were fully adversarial, as contemplated by the Legislature." *Babcock v. State*, 112 Wn.2d 83, 102, 768 P.2d 481, 491 (1989). It is the integrity of that adversarial process that absolute immunity protects. *See Butz v. Economou*, 438 U.S. 478, 512 (1978).

Malley v. Briggs involved a much lower level of involvement in the judicial process and was essentially nonadversarial in character. The police officer in *Malley* presented

complaints and two supporting affidavits to a district court judge for the purpose of establishing probable cause for issuance of an arrest warrant. The proceeding was apparently conducted ex-parte, and the information presented was not subject to challenge by an opposing party at that phase.

Although arguably close to the point at which absolute immunity would attach, the Court found, in part for historical reasons, that providing information to a judge in support of an application for an arrest warrant was conduct not "intimately associated with the *judicial* phase of the criminal process." Id at 342 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)) (Emphasis in original). The Court held that the police officer was only entitled to the qualified immunity traditionally accorded to complaining witnesses at common law prior to enactment of the Civil Rights Act in 1871.

The decision below was entirely consistent with this Court's immunity analysis in *Malley v. Briggs*.

IV. THERE IS NO CONFLICT BETWEEN CIRCUITS AS TO THE IMMUNITY OF THOSE INTIMATELY INVOLVED IN THE JUDICIAL PROCESS

Petitioners' claim that the decision below is in conflict with immunity decisions in other circuits is based on cases which are distinguishable both on the facts and on the law. Two of the cases relied upon by Petitioners, from the Sixth and Seventh Circuits, involved assertions of qualified immunity only. *Doe v. Bobbitt*, 881 F.2d 510 (7th Cir. 1989); *Eugene D. v. Karman*, 889 F.2d 701 (6th Cir. 1989). The qualified immunity issue in those cases was whether state officials had violated a clearly established constitutional right. Neither involved the issue decided below in this case: whether defendants were entitled to absolute immunity based upon their role in the judicial phase of dependency proceedings.

Four other cases cited by Petitioners, from the Second, Fifth, Sixth, and Tenth Circuits, concern unilateral actions taken by caseworkers and other government officials where no judicial proceedings were involved. *Achterhof v. Selvag-*

gio, 886 F.2d 826 (6th Cir. 1989) (caseworker's decision to open investigation and place father's name on central registry); *Spielman v. Hildebrand*, 873 F.2d 1377 (10th Cir. 1989) (removal of child from preadoptive foster parents without prior agency hearing); *Hodorowski v. Ray*, 844 F.2d 1210 (5th Cir. 1988) (removal of children from home without prior court order); and *Robison v. Via*, 821 F.2d 913 (2nd Cir. 1987) (seizure of children suspected to be victims of abuse without prior court order). In each of those cases the circuit court held that the activities for which absolute immunity was asserted were administrative, investigative, or more akin to police functions than prosecutorial in nature. None involved advocacy, testifying, or recommendations before a judicial body. The intimate association with the judicial process which Respondents had in this case was lacking.

Petitioners also rely on *Austin v. Borel*, 830 F.2d 1356 (5th Cir. 1987) to support their claim of conflict between the circuits. That case is readily distinguishable on its facts. The plaintiff sought to recover for the filing by a Louisiana caseworker of an allegedly false verified complaint seeking removal of children for suspected sexual abuse. Under Louisiana law, a caseworker filing a complaint acts as a complaining witness, not as a prosecutor. *Id* at 1360-61. Complaining witnesses in criminal cases were entitled to qualified, rather than absolute immunity at common law. *Malley v. Briggs*, 475 U.S. at 335. The prosecutorial analogy could not be supported in *Austin*, thus the Fifth Circuit held that the caseworker was not entitled to absolute immunity. 830 F.2d at 1363.

The other cases cited by Petitioners actually upheld caseworkers' claims of absolute immunity based on their roles in initiating and pursuing juvenile court proceedings. *See Malachowski v. City of Keene*, 787 F.2d 704 (1st Cir.), *cert. denied*, 479 U.S. 828 (1986) (police officer's filing of a petition of delinquency against a minor was intimately associated with the judicial phase of the criminal process); *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984) (state employees responsible for prosecution of child neglect peti-

tion, and psychologist and psychiatrists whose findings were used to determine environment best suited for child's interests, were integral parts of the judicial process). *Accord, Meyers v. Contra Costa County Dep't of Social Services*, 812 F.2d 1154, 1157 (9th Cir.), *cert. denied*, 484 U.S. 829, (1987) (caseworkers are absolutely immune for their role in initiating and pursuing child dependency proceedings); *Coverdell v. Dept. of Social and Health Services*, 834 F.2d 758, 764 (9th Cir. 1987) (caseworker is absolutely immune for obtaining and executing a court order for seizure and placement of a newborn child).

A careful reading of the circuit court decisions on caseworker immunity reveals that there is no inconsistency, either in policy or analysis, among the circuits. All have followed the analytical framework established by this Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976) for determining claims of absolute immunity. In cases where there was no connection between the function of the caseworker and the judicial process, or where the connection was remote, the circuit courts have denied claims of absolute immunity. But, in cases where caseworkers' functions were intimately associated with the judicial process, the circuit courts have found absolute immunity.

Overlooked in Petitioners' analysis of the case is the intense and constant involvement in the welfare of these children by a duly established court of law. It is that judicial involvement that sets this case apart from those cited by Petitioners in which absolute immunity was not found.

V. A SEPARATE "CASEWORKER IMMUNITY" STANDARD IS UNNECESSARY

The integrity of the judicial process is already well protected by existing decisions of this Court, which focus on the relationship of the functions performed by officials asserting immunity rather than their status. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Butz v. Economou*, 438 U.S. 478 (1978); *Briscoe v. LaHue*, 460 U.S. 325 (1983). When activities are intimately associated with the judicial process, as in the

instant case, this Court's previous decisions make clear that immunity must be extended to those functions. The circuit courts have recognized this analytical framework and have been consistent in its application. As is demonstrated above, circuit court decisions have uniformly looked to the degree of association with the judicial process in determining absolute immunity. Petitioners have failed to identify that underlying principle—protection of the integrity of the judicial process—and have instead urged this Court to "address the existence and extent of immunity for foster care caseworkers." (Pet. 9)

To address absolute immunity for each category of government official, in place of a functional approach, would depart radically from existing immunity analysis. This Court's function, traditionally and wisely, is to provide the general legal and analytical framework for application to specific fact patterns. That guidance already exists, and it has been adhered to by the court below in this case.

VI. CONCLUSION

Petitioners' request that this Court review the Ninth Circuit Court of Appeals decision granting Respondents absolute immunity should be denied. Throughout the course of this litigation, Petitioners have attempted to use the caseworkers as a lightning rod for their attacks on the Washington dependency statute and the placement decisions of a court. But, as the Ninth Circuit recognized, the statutory duties and functions performed by Respondents were intimately associated with the judicial process. Operating within the analytical framework previously established by this Court, and consistently adhered to in the decisions of other circuits as well as its own prior decisions, the Ninth Circuit correctly found Respondents entitled to absolute immunity.

The principle of protecting the integrity of the judicial process, through absolute immunity for those whose functions play an integral role in that process, is well established by this Court and has been consistently applied in the lower courts. This case provides no opportunity for further clarifi-

cation or elaboration of that principle. The Petition should be denied.

Respectfully submitted,

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DATED: January 5, 1990

APPENDIX A

[No. 53376-8. En Banc. March 2, 1989.]

RUDOLPH BABCOCK, ET AL, *Appellants*, v. THE STATE OF WASHINGTON, *Respondent*.

[1] Torts — Immunity — Adversarial Judicial Proceedings. Participants in adversarial judicial proceedings are absolutely immune from liability for their actions at the proceedings.

[2] Juveniles — Parental Relationship — Dependency — Immunity of State and Its Agents. Social service caseworkers and the State are absolutely immune from liability for the execution of the full range of their duties under RCW 13.34 in connection with their participation in child dependency proceedings.

[3] Principal and Agent — Vicarious Liability — Defenses of Agent. Principals may assert all of their agents' defenses that, rather than being personal to the agents, relate directly to their status as agents.

[4] Torts — Outrage — Elements — Nature of Conduct. Only conduct that goes beyond all possible bounds of decency such that a civilized community would regard it as atrocious and utterly intolerable is sufficiently extreme to be the basis for a claim for the tort of outrage.

[5] Torts — Alienation of Affections — Elements — Malice. A third person's interference with an existing family relationship must be malicious and unjustifiable to be the basis for a claim for the tort of alienation of affections.

[Note: Only 3 Justices concur in all of the above statements.]

DOLLIVER and ANDERSEN, JJ., concur in the result only; UTTER, BRACHTENBACH, and PEARSON, JJ., dissent by separate opinion; SMITH, J., did not participate in the disposition of this case.

Nature of Action: The father and grandparents of children who had been sexually abused by a foster parent, as well as the children themselves, sought damages from the State and individual social service caseworkers for negligence, outrage, and alienation of affections.

Superior Court: The Superior Court for Benton County, No. 84-2-00850-1, Fred R. Staples, J., on November 21, 1986, granted a summary judgment in favor of the defendants.

Supreme Court: Holding that the individual defendants and the State were immune from negligence liability and that there were no unresolved material facts regarding the claims of outrage and alienation of affections, the court *affirms* the judgment.

Michael R. Seidl, Bullivant, Houser, Bailey, Pendergrass & Hoffman, Robert J. Crotty, and *Lukins & Annis,* for appellants.

Kenneth O. Eikenberry, Attorney General, Owen F. Clarke, Senior Assistant, and *Michael E. Grant, Assistant,* for respondent.

DORE, J.—We affirm a trial court's grant of summary judgment and its dismissal of all plaintiffs' claims for negligence, alienation of affections and outrageous conduct arising out of the foster placement of four minor girls. Both the State and individual caseworkers for the Department of Social and Health Services are immune from suit. There is no triable issue of outrageous conduct or of alienation of affections.

FACTS

Rudolph and Ann Long Babcock were married in 1970. Ann was the mother of two children from a prior marriage, Angela Long and Aryn Long. Rudolph and Ann later had two other daughters, Erika and Beth. Rudolph and all the girls but Aryn are plaintiffs in the present suit.

On August 28, 1978, Ann Babcock, the mother of the four girls, committed suicide. Rudolph was apparently unable to care for the four girls himself, and in July 1981, the Louisiana Department of Health and Human Resources (hereinafter DHHR) obtained an order of dependency mandating their removal from his care and custody. Following a 4–day hearing in July and August 1981, the Louisiana court ordered DHHR to place the girls with the parents of Rudolph Babcock, Willis and Elizabeth Babcock. The elder Babcocks were residents of Richland, Washington, and the court's order directed DHHR to transfer the case to Washington under the interstate compact on the placement of children, codified in this state at RCW 26.34. The girls arrived in Richland approximately 3 weeks later. Rudolph also moved in with his parents.

On October 7, 1981, the Louisiana court ordered Rudolph to leave his parents' home and to reside apart from the girls. He did so, traveling to Wisconsin, where he established a new residence. On the same date, the Louisiana court formally relinquished jurisdiction under the interstate compact on the condition that Washington accept jurisdiction over the case. The juvenile division of Benton County Superior Court accepted jurisdiction on November 5, 1981.

DSHS assigned caseworker Wanda Tyler to the case of the Long and Babcock girls. During October 1981, Aryn Long ran away from the elder Babcocks' home twice. Following these incidents, Tyler placed Aryn in a licensed foster home under the supervision of Marilyn Wallace. Wallace was a secretary at the school attended by the girls. Angela Long asked to be placed in the Wallace home with her sister. Tyler acquiesced, and in December 1981, Angela also moved out of the elder Babcocks' home.

In February 1982 Rudolph Babcock removed his daughters Erika and Beth from his parents' home, taking them to his new home in Wisconsin. DSHS, acting in conjunction with the Prosecuting Attorney for Benton County,

obtained a warrant for Rudolph's arrest on charges of custodial interference and an order of requisition for the Babcock girls. The warrant was later quashed. At a hearing held on April 14, the Wisconsin court granted full faith and credit to the Washington order of requisition and remanded the girls to the custody of Mark Bronson, who had replaced Tyler as the DSHS caseworker responsible for the Long/Babcock case. On April 19, 1982, Erika and Beth returned to Washington.

Meanwhile, following Washington's acceptance of jurisdiction, a dependency disposition hearing under RCW 13.34.110 was held on March 31, 1982, in Benton County Juvenile Court. Rudolph Babcock was represented by counsel at that hearing, and his counsel moved for a continuance of the hearing. The juvenile court granted the continuance as to the Babcock girls, and made a "temporary order" that the Long girls should be transferred to the custody of Lee and Janet Michael. Janet Michael is the sister of the Long girls' natural mother, Ann Long Babcock. Upon the return of the Babcock girls from Wisconsin in late April, they too were placed in the Michael home.

On May 4, 1982 a second hearing was held in the Long/Babcock case. As required by RCW 13.34.120, DSHS submitted a report and recommendation to the juvenile court. In her report, Wanda Tyler recommended that all four girls remain in the custody of the Michaels. Tyler's report also recommended that the court consider reuniting the girls with Rudolph when he could show steady employment and success in psychological counseling. Rudolph Babcock was present at the May 4 hearing and again was represented by counsel. Babcock objected to the recommendation of DSHS on the ground that the Michaels had petitioned the Louisiana court for custody of the girls, and had been refused. Babcock also contended that the Michaels would interfere with his relationship with the girls, making reunification of the family impossible. Finally, Babcock contended that the conditions which led the Louisiana court to declare the girls in need of care no longer existed. Responding to a question

from the bench, Babcock indicated that he was employed. Without taking further evidence, the juvenile court continued the matter on the ground that the record from Louisiana was incomplete. The court ordered that the girls should remain with the Michaels during the continuance.

The next hearing in the matter was heard on August 12, 1982, on Rudolph Babcock's motion to dismiss the girls' dependency cases. The motion was denied.

A third disposition hearing was held on August 26 and 27, 1982. The DSHS offered extensive expert testimony by Maureen Shenker, the Long girls' therapist, and Elaine Adolph, the Babcock girls' therapist. Both experts described their evaluations of the girls, and both expressed the opinion that, to the extent the girls remained troubled, it was probably attributable to their lack of a permanent home. Both experts expressed the opinion that the Michaels were providing a stable, nurturing environment for the girls. Rudolph Babcock was represented by counsel at the hearing, and his attorney cross-examined both experts thoroughly, particularly as to the Michaels' influence over the girls' views of Babcock.

At the August 1982 review hearing, the court also heard testimony from Mark Bronson, the DSHS caseworker responsible for the Long/Babcock matter and a defendant here. Bronson testified that, based on the report prepared for the court under RCW 13.34.120, the DSHS recommended making the Michaels guardians of the Long girls. The attorney for Daniel Long, the girls' father, joined in that recommendation. As to the Babcock girls, the DSHS recommended continued dependency placement with the Michaels on the ground that keeping the sisters together was preferable to attempting to reunite the Babcock girls with their father, especially given residence in another state. Bronson, too, was cross-examined at length by counsel for Rudolph Babcock.

Counsel for Babcock then introduced expert testimony giving a psychological profile of Rudolph and recommending that the Babcock girls should be reunited with their father rather than to remain with the Michaels.

Lee Michael testified on the second day of the August 1982 hearing regarding his relationship with the girls and his hostile relationship with Rudolph Babcock. Babcock's counsel cross–examined him extensively. Janet Michael, the girls' aunt also testified and was also cross–examined by Babcock's counsel.

The court also heard testimony from Rudolph Babcock on the second day of the August hearing. Babcock was examined in regard to his relationship with the Long girls, his stepdaughters. He testified concerning his finances and employment history, his family situation in Wisconsin—he was living with a woman with four children of approximately the same age as his own daughters—the circumstances of his taking Erika and Beth from Washington to Wisconsin without authority and his hostile relationship with Lee Michael. Babcock stated his desire that his daughters be placed in foster care in Wisconsin under the interstate compact.

In closing statements, counsel for DSHS recommended that the Long and Babcock girls remain with the Michaels in a dependency placement under RCW 13.34.130. Guardianship proceedings would be begun in the Long girls' case, but that with regard to the Babcock girls, psychological and home studies of Rudolph Babcock should be commenced in Wisconsin under the interstate compact, with a view toward reuniting the Babcock girls with their father.

Counsel for Rudolph Babcock asked the court to turn all four girls over to the jurisdiction of Wisconsin under the interstate compact, where they would remain in foster care until they could be reunited with Rudolph by the courts of that state.

The juvenile court ordered that all four girls should remain with the Michaels, but that the Babcock girls should be reunited with their father as soon as positive

psychological and home studies could be completed and submitted.

On November 2, 1982, following the receipt of the Wisconsin reports, a review hearing under RCW 13.34.130 was held as to the Babcock girls alone. The Wisconsin caseworker reported that, because of insufficient information, she could not make a recommendation regarding Rudolph Babcock. The court heard argument of counsel, including counsel for Babcock, and ordered that, because of the inconclusive report, no final action could be taken. The Babcock girls therefore remained in the Michaels' care.

On November 11, 1982, Babcock moved for the transfer of his daughters to Wisconsin. No further information had been received from Wisconsin and Wisconsin had not agreed to accept jurisdiction under the interstate compact. The court heard arguments of counsel, including counsel for Babcock, and denied the motion.

On December 16, 1982, the juvenile court heard a second motion by Babcock for the placement of Erika and Beth in foster care in Wisconsin. Wisconsin's position on the matter remained unchanged. The court heard argument and explanations from counsel regarding the inability of the Wisconsin authorities to complete a successful home study of Babcock. Counsel for Babcock offered the testimony of Erika and Beth regarding their experience living with Rudolph in Wisconsin, and the court apparently heard that testimony in camera. Supplemental Clerk's Papers, at 203–04. The court heard testimony of Suzanne Reinicke, the mother of four with whom Rudolph Babcock was then living in Wisconsin. Reinicke testified concerning the home in Wisconsin and the period during which Erika and Beth had lived with Babcock there. The court denied the motion.

On December 28, 1982 Babcock again renewed his motion for the return of his daughters. Given that no new circumstances were presented, the court denied the motion. The Babcock girls remained in the Michael home.

The juvenile court held another review hearing on the Babcock girls' case on March 7, 1983. Home study and psychological reports from Wisconsin were received in evidence and again were inconclusive. The court therefore accepted DSHS's recommendation that the girls remain with the Michaels, again pending a successful home study and psychological evaluation of Rudolph Babcock.

In early 1983, Babcock moved from Wisconsin to Oklahoma, and on September 21, 1983 the juvenile court heard a motion by Babcock to place the Babcock girls in foster care in Oklahoma. The court heard extensive testimony from Rudolph Babcock concerning his move, his employment, his relationship with Reinicke and the reasons for the Wisconsin authorities to complete the home study the court had requested in May 1982. The court also heard testimony from Reinicke. Lee Michael was also called to testify as to his continuing custody of the girls and his continuing hostile relations with Babcock. The court denied Babcock's motion on the ground that it lacked a complete and positive home study from Oklahoma or Wisconsin and because the relationship between the girls and their aunt and uncle appeared to be positive.

> Now there are a couple of young ladies involved here. Their best interest is my main purpose in being here. And they are being well cared for. And there is a certain bonding between them and the aunt and uncle. And for me to, in a vacuum just order those kids to a strange state and a strange environment, I would be out of my mind to do that, without knowing that their welfare was, in the future, very, very bright.

Supplemental Clerk's Papers, at 304–05.

The Long and Babcock girls remained in the Michael home until October 1983, when it was discovered that Lee Michael had sexually abused all four girls, in addition to his own daughter. Michael was arrested and subsequently convicted on three counts of statutory rape and two counts of

indecent liberties. He is presently serving a 55-year sentence.[1]

At the time he was awarded custody of the four girls on the recommendation of DSHS, Lee Michael had a substantial criminal record, which included charges of forcible rape, attempted rape and sexual assault. The DSHS admits that had it discovered this criminal record, it would not have recommended placing the girls in the Michael home. Clerk's Papers, at 3363.

The DSHS recommendation was based on a single home study conducted by Tyler in November 1981. Tyler testified in her deposition that the purpose of the study was not to evaluate the Michaels as adoptive parents, but only as foster parents. In conducting her evaluation, however, Tyler used the home evaluation checklist on a form entitled "Adoption Application." The checklist includes the question "Have you ever been convicted of a crime?" Tyler did not ask that question, thereby failing to discover Lee Michael's criminal record. Tyler conducted no other investigation which would have or did reveal that record.

Based on Tyler's and DSHS's failure in this regard, Rudolph, Willis and Elizabeth Babcock, Angela Long and Beth and Erika Babcock filed identical suits in state and federal court alleging negligence, the tort of outrage, alienation of affections and the violation of federal civil rights under color of state law, 42 U.S.C. § 1983.

The federal court at first denied the defendants' motion for abstention under the doctrine enunciated in *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976). However, the federal court later reversed itself, sua sponte, and dismissed

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[1]Following the departure of Lee Michael, the Long and Babcock girls asked to be allowed to continue living with Janet Michael. They were permitted to do so. In December 1983, following a successful home study, the two Babcock girls were returned to the custody of Rudolph, who had moved to Oklahoma. Aryn and Angela Long continued in the custody of Janet Michael until they reached the age of majority.

the claims of the father and daughters without prejudice. The grandparent's claims were dismissed with prejudice.

On October 1, 1986 Benton County Superior Court granted defendants summary judgment on all plaintiffs' claims. Subsequently, the federal court again revised its order, reinstating the case of the father and daughters, but staying federal proceedings pending the outcome of this state court suit. On April 20, 1986, the federal court lifted its stay as to the section 1983 claims of the father and daughters.

As a consequence, the parties do not appeal the Superior Court's dismissal of the section 1983 claims asserted in state court. This case concerns only the claims for negligence, alienation of affections and outrageous conduct.

Plaintiffs' Claims Are Not Barred by Res Judicata

The State contends that the plaintiffs' claims are precluded under the doctrine of res judicata, because they are "no more than a thinly veiled attempt to relitigate facts and issues previously litigated in the Benton County Juvenile Court." Brief of Respondent, at 15–16. The trial court accepted this argument, but it erred in doing so. Res judicata is inapplicable here.

The State fails to distinguish between claim preclusion and issue preclusion in its brief, or to specify which sort of preclusion it thinks is required here. We explained the difference in our recent decision in *Shoemaker v. Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987).

> The general term res judicata encompasses claim preclusion (often itself called res judicata) and issue preclusion, also known as collateral estoppel. Under the former a plaintiff is not allowed to recast his claim under a different theory and sue again. Where a plaintiff's second claim clearly is a new, distinct claim, it is still possible that an individual issue will be precluded in the second action under the doctrine of collateral estoppel or issue preclusion. In an instance of claim preclusion, all issues which might have been raised and determined are precluded. In the case of issue preclusion, only those issues

actually litigated and necessarily determined are precluded.

Claim preclusion is proper only when the later suit presents the same claim as the earlier suit. For example, in *Sanwick v. Puget Sound Title Ins. Co.*, 70 Wn.2d 438, 441, 423 P.2d 624, 38 A.L.R.3d 315 (1967), the plaintiff sued first for specific performance and then for damages under the same contract. The second suit was dismissed on the ground that the plaintiff had improperly split his claim. The doctrine of claim preclusion prohibits claim splitting as a matter of policy, primarily in order to conserve judicial resources and to ensure repose for parties who have already responded adequately to the plaintiff's claims. The key inquiry is whether the second suit does indeed present the same claim as the first. We have stated the standard for that determination as follows:

> (1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Norco Constr., Inc. v. King Cy., 106 Wn.2d 290, 294, 721 P.2d 511 (1986).

Claim preclusion obviously is not appropriate here. Perhaps the juvenile court proceedings and the plaintiffs' claims arise out of the same nucleus of fact, but it would be absurd to contend that the plaintiffs seek to affect rights established by the juvenile court or that the juvenile court was in any way concerned with the infringement of the rights on which plaintiffs' present claims are based. Most of all, it is impossible to see how the two actions could possibly involve the same body of evidence when the plaintiffs' present claims are based primarily on the fact that key evidence was omitted, allegedly through the fault of DSHS, at the juvenile court proceedings. Claim preclusion is therefore not called for.

The State is no more entitled to collateral estoppel. The theory behind collateral estoppel is that, even where claim preclusion is not proper, the two claims of the plaintiff may involve common issues of fact. Under the doctrine of collateral estoppel, or issue preclusion, those individual issues will not be relitigated. The requirements for collateral estoppel are: (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; (4) the issue to be precluded must have been actually litigated and necessarily determined in the prior action; and (5) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. *Shoemaker*, at 507–08.

Since the State has not specified which issues it thinks are precluded by the juvenile court proceedings, it is difficult to apply the test. On the record we have, however, it is clear the requirements for collateral estoppel are not met. The only issues actually determined by the juvenile court at any of the many hearings held in the Long/Babcock cases were those set forth in RCW 13.34.130, which governs the disposition of children found to be dependent and in need of care. None of those issues is identical to the issues raised by the plaintiffs' claims for negligence, alienation or outrage. Therefore, no issues in this case are precluded under the doctrine of collateral estoppel.

The Individual Defendants Are Absolutely Immune From Suit

We hold that the individual defendants are entitled to absolute immunity from suit on the ground that the acts complained of occurred in the course of judicial proceedings prescribed by statute. The gravamen of the plaintiffs' complaint for negligence is that the defendants failed to inform the juvenile court of Lee Michael's criminal record, as a result of which the girls were placed in his home, where they suffered great harm. As the plaintiffs present the facts,

the placement decision was made by DSHS with the juvenile court acting solely on the Department's recommendation, more or less as a rubber stamp. As the statement of facts above demonstrates, however, just the opposite is true. The decision to place the girls in the Michael home was not made by DSHS, but by the juvenile court. It would be manifestly unjust to hold the caseworkers liable for a decision of the court which was beyond their control.

The plaintiffs contend that the mere fact that a judicial order intervened should not insulate the caseworkers and the State from liability for their omissions in the investigation of the Michaels. There are two reasons why this is not so. First, the report of DSHS, whatever its faults, was only one part of the body of evidence considered by the court in placing the girls with the Michaels and in permitting them to remain there over so many months. A large body of evidence was heard in the course of a number of separate hearings. It included the testimony of experts who had examined the girls as well as family members including Rudolph Babcock and Lee Michael himself. The court was willing from the first to return the Babcock girls to their father, but was unable to do so because it never received information sufficient under RCW 13.34.130 to permit it to do so. On the record we have, we can say as a matter of law that the report of the DSHS workers was not the proximate cause of the injury complained of.

We need not even reach the proximate cause issue, however, because the caseworkers are absolutely immune from suit. Their immunity rests on their status as participants in the hearings conducted in this case as required under RCW 13.34.110. It is well established that the participants in adversarial judicial proceedings are entitled to absolute immunity as a safeguard on the integrity of such proceedings.

A. Immunity for Participants in Adversarial Judicial Proceedings

The caseworkers' role in this matter was established by the Legislature in setting up procedures to govern the disposition of dependent children. RCW 13.34.110 mandates a fact–finding hearing on the dependency petition to be followed by a separate hearing on the dependent child's disposition. The initial dependency hearing in this case took place in Louisiana. The disposition hearing was held, after two continuances, on August 26 and 27, 1982. The DSHS's role in the disposition hearing is specified in RCW 13.34-.120:

> (1) To aid the court in its decision on disposition, a social study, consisting of a written evaluation of matters relevant to the disposition of the case, shall be made by the person or agency filing the petition. The study shall include all social records and may also include facts relating to the child's cultural heritage, and shall be made available to the court. The court shall consider the social file and social study at the disposition hearing in addition to evidence produced at the fact–finding hearing. At least ten working days before the disposition hearing, the department shall mail to the parent and his or her attorney a copy of the agency's social study and proposed service plan, which shall be in writing or in a form understandable to the parents or custodians. In addition, the department shall provide an opportunity for parents to review and comment on the plan at the community service office. If the parents disagree with the agency's plan or any part thereof, the parents shall submit to the court at least twenty–four hours before the hearing, in writing, or signed oral statement, an alternative plan to correct the problems which led to the finding of dependency. This section shall not interfere with the right of the parents or custodians to submit oral arguments regarding the disposition plan at the hearing.
>
> (2) In addition to the requirements set forth in subsection (1) of this section, a predisposition study to the court in cases of dependency alleged pursuant to RCW 13.34.030(2) (b) or (c) shall contain the following information:

(a) A statement of the specific harm or harms to the child that intervention is designed to alleviate;

(b) A description of the specific programs, for both the parents and child, that are needed in order to prevent serious harm to the child; the reasons why such programs are likely to be useful; the availability of any proposed services; and the agency's overall plan for ensuring that the services will be delivered;

(c) If removal is recommended, a full description of the reasons why the child cannot be protected adequately in the home, including a description of any previous efforts to work with the parents and the child in the home; the in-home treatment programs which have been considered and rejected; and the parents' attitude toward placement of the child;

(d) A statement of the likely harms the child will suffer as a result of removal. This section should include an exploration of the nature of the parent-child attachment and the meaning of separation and loss to both the parents and the child;

(e) A description of the steps that will be taken to minimize harm to the child that may result if separation occurs; and

(f) Behavior that will be expected before determination that supervision of the family or placement is no longer necessary.

At the August hearing Mark Bronson testified for DSHS, based on the report prepared by Wanda Tyler.

[1] The fact that the caseworkers acted as participants in an adversary hearing renders their actions immune under the common law doctrine of absolute immunity for participants in judicial proceedings. This immunity is well described by the United States Supreme Court in the cases *Imbler v. Pachtman*, 424 U.S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976), *Butz v. Economou*, 438 U.S. 478, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978) and *Briscoe v. LaHue*, 460 U.S. 325, 75 L. Ed. 2d 96, 103 S. Ct. 1108 (1983).[2]

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[2]All three of these cases—*Imbler*, *Butz* and *Briscoe*—were federal suits based on 42 U.S.C. § 1983, which authorizes suit in federal and state court for injuries inflicted by state officials under color of state law. As noted, these plaintiffs' claims under section 1983 are not before us. However, the immunities recognized

The defendants contend that these cases establish two separate grounds of immunity. First, social services caseworkers are said to be entitled to quasi–prosecutorial immunity because a caseworker's role in dependency proceedings under RCW 13.34 is analogous to that of a prosecutor in criminal proceedings. Second, the defendants argue that the caseworkers are entitled to immunity as witnesses. The defendants are almost correct. The leading cases actually set forth a single theory of immunity: that participants in adversarial judicial proceedings are immune from suit as a safeguard on the integrity of the adversarial process itself.

In *Imbler*, the plaintiff alleged that a state prosecuting attorney had knowingly used false evidence and had suppressed exonerating evidence at his trial for felony murder. The Court held the prosecutor immune from suit under section 1983 on the ground that prosecutorial immunity at common law was incorporated into the Civil Rights Act by Congress.[3] That common law immunity has several grounds. There is the effect on the prosecutor himself: civil suits would distract him from the business of his office. There is also a question of efficiency, in that the civil suit would require a virtual retrial of the criminal case. Above all, however, prosecutorial immunity is required to preserve the truth–finding function of the criminal trial. The threat of liability to suit would have a chilling effect on the initiation of criminal prosecutions and on the prosecutor's conduct at trial. The jury's function might be impaired by a prosecutor's decision to withhold evidence that is relevant but not ironclad. Finally, the judgment of those responsible

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in *Imbler*, *Butz* and *Briscoe* were all founded on common law. The immunities and the logic behind them are, therefore, equally applicable to the plaintiffs' tort claims.

[3]The Court had previously recognized such incorporated immunity for legislators in *Tenney v. Brandhove*, 341 U.S. 367, 95 L. Ed. 1019, 71 S. Ct. 783 (1951) and for judges in *Pierson v. Ray*, 386 U.S. 547, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967).

for evaluating the fairness of the trial on appeal and collateral review might be biased by the knowledge that a favorable decision for the prisoner could subject the prosecutor to liability.

The important thing to notice about the *Imbler* case is that it bases prosecutorial immunity on the nature of the criminal proceeding; *not* on the nature of the prosecutor's duties. The Court reinforced this point in its opinion recognizing "quasi-prosecutorial" immunity in *Butz*. The plaintiff in *Butz* sued officials of the Department of Agriculture for their initiation and conduct of an adversarial administrative hearing related to his status as a commodities broker. The Court held that the hearing examiner and administrative law judge were entitled to absolute immunity.[4]

Butz's grant of immunity to the two officials was based on the resemblance between the adversarial administrative hearing and a criminal trial. *Butz*, at 512–13. The hearing officer and administrative law judge in *Butz* were *not* held immune because of their resemblance to a prosecutor and trial judge. The critical fact was that they were participants in an adversarial proceeding in need of the same safeguards as a criminal trial. Justice White's opinion stresses that the prosecutorial immunity recognized in *Imbler* is based on the prosecutor's status as one of "the various participants in judge-supervised trials," a group which includes judges, grand jurors, petit jurors and witnesses. *Butz*, at 509–12. He discusses the features of a criminal trial stressed in *Imbler* and also several others which justify immunity for the various participants in any adversarial proceeding. First, immunity serves the system's interest in finality.

> The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process . . . [C]ontroversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will

[4]The Court rejected the contention that the Secretary and Assistant Secretary of the Department were entitled to absolute immunity.

> frequently seek another, charging the participants in the first with unconstitutional animus. Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

(Citations omitted.) *Butz*, at 512. Second, a variety of features of adversary proceedings make civil suits based on their conduct unnecessary or redundant.

> [T]he safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges. Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. Jurors are carefully screened to remove all possibility of bias. Witnesses are, of course, subject to the rigors of cross-examination . . . and the impartiality of the decisionmaking process, there is a less pressing need for individual suits to correct constitutional error.

(Footnote omitted.) *Butz*, at 512. Since these considerations are equally present in criminal trials and administrative hearings, the Court recognized immunity for the hearing officer and administrative law judge.

In *Briscoe*, the Court considered whether witnesses are entitled to immunity in section 1983 suits. Given the logic of *Imbler* and *Butz*, the Court had no difficulty in determining that they are. As the Court noted in discussing *Imbler* and *Butz*: "The central focus of our analysis has been the nature of the judicial proceeding itself." *Briscoe*, at 334. Witnesses, the Court held, are entitled to immunity for the sake of the adversary process.

> In the words of one 19th-century court, in damages suits against witnesses, "the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Calkins v. Sumner*, 13 Wis. 193, 197 (1860). A witness'

> apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability.

(Citations omitted.) *Briscoe*, at 332-33.

Based on *Imbler* and progeny, a number of courts have recognized immunity for social services workers in cases similar to this one, based on their role in judicial proceedings. *See Meyers v. Contra Costa Cy. Dep't of Social Servs.*, 812 F.2d 1154 (9th Cir 1987); *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984); *Hennessey v. State*, 627 F. Supp. 137 (E.D. Wash. 1985); *Whelehan v. County of Monroe*, 558 F. Supp. 1093 (W.D.N.Y. 1983).

B. The Defendants in This Case Are Immune

[2] In deciding whether immunity is appropriate in this case, the question is whether the proceedings established for dependency cases by RCW 13.34 are adversarial proceedings in need of the same sort of protection recognized as a necessity in *Imbler*, *Butz* and *Briscoe*. It should be apparent from the proceedings actually conducted in this case that they are, particularly where the report and recommendation of DSHS is concerned. First, the report of DSHS cannot be received in a fact-finding or disposition hearing "except as otherwise admissible under the rules of evidence." RCW 13.34.110. Second, the Department is required to make its report and recommendation available to parents of dependent children, and the Legislature has stipulated that: "This section [relating to the Department's report] shall not interfere with the right of the parents or custodians to submit oral arguments regarding the disposition plan at the hearing." RCW 13.34.120. In the August 1982 hearing, Rudolph Babcock was represented by counsel who vigorously cross-examined Mark Bronson, the DSHS witness who presented the report to the court. Babcock's counsel was given a full opportunity to argue that the court should disregard the DSHS report and recommendations and he did so. In all the hearings conducted in this matter,

all parties had a full opportunity to offer evidence, cross-examine and argue to the court and those opportunities were fully exploited. The proceedings here were fully adversarial, as contemplated by the Legislature.

Under the logic of *Imbler* and progeny, therefore, immunity for DSHS caseworkers acting in dependency proceedings is required. First, although it was not a consideration here, the threat of subsequent civil suits would surely cause Department employees to fail to initiate dependency proceedings in cases where they otherwise would do so. In this the caseworkers resemble prosecutors, but note that what matters is not the nature of the officials, but the nature of the proceedings. Without immunity for DSHS caseworkers, the adversarial character of dependency proceedings would suffer in the same way that criminal trials would suffer if prosecutors were threatened with liability: the cases would never be brought.

Second, immunity is required to protect the caseworkers in their role as witnesses. This too bears on the adversarial nature of dependency proceedings. The Department is required to submit a broad range of information to the juvenile court under RCW 13.34.120. It does so in both written reports and in testimony before the court. Without immunity, caseworkers may well hold back critical information needed by the court in order to render a proper decision. In adversarial dependency proceedings, this might lead the court not to declare dependency where it would in fact be in the best interests of the child, because DSHS has not been able to do the vigorous job that RCW 13.34.120 contemplates.

Third, the adversarial nature of dependency proceedings renders subsequent civil proceedings unnecessary as a check on the fairness or thoroughness of the dependency process or DSHS itself. Despite the tragic outcome in this case, the fact remains that, to the best of the judiciary's ability, the rights and interests of all participants were fully protected in the dependency proceedings. The Babcocks, as adversary parties, had every opportunity of notice, cross

examination and argument to challenge the DSHS within the dependency proceeding and to expose the shortcomings of the Department's report. Permitting a second contest over the same matter would have no deterrent or encouraging effect on the Department not already provided by the adversarial nature of the dependency proceeding itself.

Fourth, as a related matter, it is obvious that this dependency matter was fought out in repeated, and redundant, hearings over the course of many months. For the sake of finality of judicial decisions and for the sake of efficiency of the judicial process, the matter should rest there. The civil suit contemplated by the plaintiffs here is not barred by the strict rule of res judicata, but the redundancy and expense of such suits is certainly a significant factor favoring the grant of immunity to Department caseworkers.

Therefore, we hold that caseworkers carrying out their statutory duties in connection with dependency proceedings under RCW 13.34 are entitled to immunity from subsequent suit, on the ground that such immunity is required to preserve the integrity of that adversarial process.

C. The Scope of the Caseworkers' Immunity

The scope of the caseworkers' immunity must extend to the full range of their duties under RCW 13.34. The aim of the entire process is to inform the court as to the course of action in the best interests of the child. The threat of liability is equally damaging to the adversarial process whether liability is imposed for preparing the report or for testifying on the basis of the report in court. In this case for example, Mark Bronson testified on the basis of a report prepared by Wanda Tyler. What would be the logic or justice in granting Bronson immunity, on the ground that he was an actual courtroom witness, while denying immunity to Tyler because she was not? If liability is imposed on either task, the court's supply of information in the dependency process will be diminished. The fact is that all the duties set forth in RCW 13.34.120 are directly related to the adversary proceedings mandated in RCW 13.34.110.

Immunity must extend to all such functions, or it is meaningless.

The dissent argues that certain courts have found child welfare agencies liable for negligent placement. Dissent, at 112. That argument has no weight here. First, applying those cases would require us to distinguish between the caseworker's actions in removing the child from the home and his actions in placing the child in dependent care. However, removal is not an issue in this case because the initial declaration that the girls were dependent and in need of care was made in Louisiana, on the recommendation of that state's DHHR. The question here is whether the caseworkers' role in the adversarial dependency proceedings conducted under RCW 13.34.110 entitles them to immunity. As to that, there is no basis for distinguishing between the removal and the placement of the child. Both decisions are in the hands of the court, first in the fact-finding hearing and then in the hearing on disposition. As to both removal and placement, the Department functions in the same advisory role, preparing a single report containing a single recommended plan of action. The need for immunity based on the integrity of the adversarial proceeding is the same in regard to both removal and placement.

Second, the cases the dissent cites for its rule are irrelevant to its argument. Those cases concern the discretionary function exception to the waiver of sovereign immunity. That theory of immunity is not an issue here. *See infra*, at 105. The dissent's reliance on these cases indicates a failure to grasp the logic of that immunity as explained in *Imbler*, *Butz* and *Briscoe*. The immunity of the caseworkers must extend to the full range of their statutory duties.

THE STATE IS IMMUNE ON THE SAME GROUND AS THE INDIVIDUALS

The State is immune to the same extent as its agents because the caseworkers' defense of immunity is not a personal one, but rather relates directly to their role as agents of the State.

As a preliminary matter, we note that the State has no general defense of sovereign immunity, since it was abolished in this State by RCW 4.96.010. That statute which provides that the State and its officers:

> shall be liable for damages arising out of their tortious conduct . . . to the same extent as if they were a private person or corporation . . .

One exception to RCW 4.96.010 which this court has recognized is the "discretionary function" exception, under which state officials engaged in the formulation of public policy are immune from suits based on basic policy determinations. *Chambers–Castanes v. King Cy.*, 100 Wn.2d 275, 669 P.2d 451, 39 A.L.R.4th 671 (1983). However, it would stretch that doctrine well past its limit to say that the social workers involved here were engaged in the formulation of basic policy. Therefore, the "discretionary function" exception to the abolition of sovereign immunity does not apply here, as many other courts have held in similar suits. *See National Bank v. Leir*, 325 N.W.2d 845 (S.D. 1982); *Koepf v. County of York*, 198 Neb. 67, 251 N.W.2d 866, 90 A.L.R.3d 1205 (1977); *Little v. State Div. of Family Servs.*, 667 P.2d 49 (Utah 1983); *Elton v. County of Orange*, 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27 (1970); *Bartels v. County of Westchester*, 76 A.D.2d 517, 429 N.Y.S.2d 906 (1980).

[3] According to the very terms of RCW 4.96.010, however, the State still is not liable here. The State is liable only to the extent a private defendant in a similar situation would be. The State acted in this case only through the caseworkers. As principal, the State may be liable for those agents' actions under the doctrine of respondeat superior. However, like any principal, the State may take advantage

of the defenses of its agent to the extent those defenses are not purely personal to that agent. *Vern J. Oja & Assocs. v. Washington Park Towers, Inc.*, 89 Wn.2d 72, 77, 569 P.2d 1141 (1977).

The defense of immunity asserted by the caseworkers here is not a personal defense. On the contrary, it is intimately related to their status as agents of the State. The whole theory behind the immunity we recognize here is to permit DSHS caseworkers to more effectively carry out their statutory duties under RCW 13.34.120. The State is therefore equally entitled to assert the same defense.

This is no more than common sense. Suppose the caseworkers were immune but the State were not. The grant of immunity would enable the caseworkers to pursue their statutory duties without the adverse effects associated with the threat of liability, as discussed above. However, if the State were not similarly immune, the restraints on the caseworkers and the consequent constraints on the flow of information to the juvenile court would be imposed as a matter of Department policy. Nothing is gained by holding the individuals immune if the State is not also immune.

Therefore, we affirm the trial court in its grant of summary judgment to the State as well as to the individual defendants.

There Is No Triable Issue of Outrageous Conduct

The plaintiffs' claims for outrage appear to relate to conduct within the scope of RCW 13.34.120 and therefore within the scope of absolute immunity. Even to the extent that claim may rest on conduct outside the bounds of immunity, however, summary judgment was appropriate. Nothing in the record indicates a triable issue of outrageous conduct.

[4] The dispositive case is *Guffey v. State*, 103 Wn.2d 144, 690 P.2d 1163 (1984), in which we considered a claim of outrage against a state trooper who, on the basis of a radio report, believed the plaintiff to be a wanted felon.

The trooper drew his weapon, ordered the plaintiff out of his car and subjected him to a pat–down search. The plaintiff was not the wanted man. This court held that, as a matter of law, the trooper's conduct was not "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Guffey*, at 146 (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 530 P.2d 291, 77 A.L.R.3d 436 (1975)).

We must reach the same conclusion here. The caseworkers, of course, had nothing to do with the rape of the girls. Their only offense was to fail to discover it. We can find nothing else in the record which remotely approaches even the trooper's conduct in *Guffey*. Like the trooper, the caseworkers were merely fulfilling their duties as public servants. If the trooper's conduct is not outrageous, as a matter of law, then the caseworkers' conduct certainly is not. We therefore affirm the trial court's grant of summary judgment.

There Is No Triable Issue of Alienation of Affections

Like the plaintiff's claims for outrage, the Babcock's claims for alienation of the girls affections probably fall within the scope of the defendants' immunity. We nevertheless will discuss briefly the merits.

[5] This court has not yet had occasion to recognize a cause of action for the alienation of a child's affection, nor for the alienation of a grandchild's affection. As guidance in considering such claims, however, courts of this state have repeatedly relied on the opinion in *Strode v. Gleason*, 9 Wn. App. 13, 510 P.2d 250, 60 A.L.R.3d 924 (1973) (Callow, J.). *Strode* states the elements as: (1) an existing family relationship; (2) a malicious interference with the relationship by a third person; (3) an intention on the part of the third person that such malicious interference results in a loss of affection or family association; (4) a causal connection between the third parties' conduct and the loss of

affection; and (5) resulting damages. *Strode*, at 14–15, 20. "Malicious interference" refers to unjustifiable interference. *Strode*, at 20.

Whatever interference in the parent–child relationship occurred here, it cannot possibly be said to be malicious or unjustifiable. The defendants were acting under the authority of law in what was necessarily a complex and emotionally charged case. As a matter of law, it is not possible for the plaintiffs to establish that the caseworkers acted with malice. Furthermore, as a matter of law, the plaintiffs could not establish that the actions of the caseworkers were the cause of any loss of affection. Confusion on the part of the girls as to where their true affections lay was, unfortunately, almost inevitable from the moment Louisiana began its dependency proceedings. To lay that at the door of the caseworkers would be unjust.

CONCLUSION

The individual defendants and the State are immune on the ground that they were participants in an adversary dependency proceeding. There is no triable issue of either outrage or alienation of affections. We therefore affirm the grant of summary judgment as to all claims.

CALLOW, C.J., and DURHAM, J., concur.
DOLLIVER and ANDERSEN, JJ., concur in the result.

UTTER, J. (dissenting)—The issue in this case concerns the negligence of DSHS in conducting a home study for the foster placement of children previously removed from their natural parents.[5] The majority, by incorrectly focusing on the liability of the caseworkers as individuals rather than DSHS as an agency, needlessly deprives appellants, tragic

[5]The agency's potential liability for negligence in removing children from the home is not at issue in this case. As the majority points out, removal of the Babcock children took place in Louisiana. Therefore, it is not necessary here, as the majority states at page 104, for the court to make a distinction between placement and removal. To do so would result in the court deciding issues not presented before it.

victims of preventable sexual abuse, from presenting their case to a jury. The majority rule in this country would allow appellants to do so. *See* Annot., *Governmental Tort Liability for Social Service Agency's Negligence in Placement, or Supervision After Placement, of Children*, 90 A.L.R.3d 1214 (1979). The majority in this case not only incorrectly analyzes the controlling issue but also, in effect, revives sovereign immunity, a doctrine abolished by the Legislature in RCW 4.96.010. Because of this misapplication of immunity and because the petitioners make out a case for negligence against the State, I dissent.

I

The trial court dismissed the appellants' case upon the defendants' motion for summary judgment. A motion for summary judgment cannot be granted against a nonmoving plaintiff if there exists an issue of material fact, either presented in the plaintiff's pleadings or in affidavits produced in opposition to the motion. CR 56. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). In such a motion, the moving party bears the initial burden of showing the absence of an issue of material fact. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). An appellate court reviewing a summary judgment places itself in the position of the trial court and considers the facts in a light most favorable to the nonmoving party. *Del Guzzi Constr. Co. v. Global Northwest Ltd.*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986). The record in this case reveals issues of material fact in support of plaintiffs Erika and Beth Babcock's claim for negligence. The majority circumvents these by framing the legal issues improperly.

In framing the issues as it has, the majority neglects to address the ultimate source of the harm experienced by the Babcock girls. The record contains nothing to suggest that the DSHS caseworkers were not following agency procedures when conducting their background investigation of Mr. Michael. The relevant inquiry, then, concerns not the

acts of the individual caseworkers but the sufficiency of DSHS's home study requirements and the adequacy of its training and supervision of personnel conducting such studies. This negligence occurred before the hearings; the damage resulting from it was discovered only afterward. Therefore, the real issue is not what happened in the hearings, but what procedures took place in the information–gathering process before they began. How did DSHS come to recommend placement in the Michael home in the first place?

On November 14, 1981, one of the DSHS caseworkers visited the Michaels' home and conducted a home study to determine that family's suitability. This was the only home visit and the only occasion in which information for the home study was gathered. The caseworker compiled the information on an "Adoption Application" form, apparently due to the Michaels' expressed interest in adopting the children at some later date. The home study reveals that Lee Michael was unemployed, had a dependence upon alcohol, and was in counseling.

Inexplicably, the caseworker failed to complete one question on the form: "Have you ever been arrested or convicted for a crime?" At the time, it was not standard DSHS policy to investigate as a matter of routine any previous arrests or convictions of prospective foster parents. Thus, DSHS never researched Lee Michael's criminal background. Had it done so, it would have discovered that Michael had a criminal history dating back to 1967 when he pleaded guilty to armed robbery and had been convicted several times in recent years of driving while intoxicated. Michael had also been charged with forcible rape in 1975 and sexual assault and attempted rape in 1979. These events occurred in Benton County. DSHS admits that had it known about this criminal history it would not have recommended that the girls be placed with the Michaels.

The initial placement of the Babcock girls in the Michael home was, in fact, made before the final hearing on the

matter. DSHS initially did this on its own initiative, without juvenile court permission, a few days after returning the girls from Wisconsin. Clerk's Papers, at 3407–08, 3638. The fact that the Babcock girls were already in the Michael home before the disposition hearings took place underscores the fact that the agency's negligence at issue here is separate from anything that may have occurred in the hearings.

Based on this factual situation, I find it inappropriate that the majority extends the individual caseworkers' witness–based immunity to DSHS through an analysis under the law of agency. It is incongruous to protect the negligent acts of the principal with the agent's immunity when the agent's own negligence, if it exists at all, is not an issue. The source of the harm was the agency's negligence, not the acts of the caseworkers following agency procedures. To protect the State this way artfully avoids getting to the bottom of the matter. It effectively creates a sovereign immunity for DSHS in foster placement cases.

Further, to extend the individuals' immunity to DSHS ignores the agency's statutory mandate. Under RCW 13.34-.120, the person or agency filing the dependency petition—here DSHS—must prepare a predisposition study for the court to use in its decision. The study, in this case, included the home study of the Michaels' residence. We cannot minimize the importance of this study. Although the juvenile court considers it along with other evidence produced at the factfinding hearing under RCW 13.34.110, the facts in this case show that the agency's recommendation is given great weight. The juvenile court's ultimate decision not to place the Babcock girls with their natural father illustrates the impact of agency input. The court did this in part because the agencies from the other involved states did not produce enough data to make full recommendations of their own. DSHS was the only agency providing information; the court followed its recommendations.

Because the juvenile court relies on the agency study to such a degree, the accuracy and completeness of this study

is paramount. DSHS has a duty to the children involved to provide accurate and complete information. This duty includes proper training of caseworkers, home study design and execution, and follow–up. It is foreseeable that some prospective foster parents may have criminal records, some of these pertaining to sex offenses. To ask the simple question whether or not the foster parent has a criminal record, or to request permission to investigate his or her records, represents a minimal burden. Asking that simple question concerning a foreseeable danger could have avoided placing the Babcock and Long girls with a man repeatedly charged with sex offenses. Failing to do so represents negligence on the part of DSHS.

Courts in other states have addressed the sort of negligence with which DSHS is associated here. These courts have found that the agencies responsible for negligent foster placement are not immune from suit. *See, e.g., National Bank v. Leir*, 325 N.W.2d 845 (S.D. 1982); *Koepf v. County of York*, 198 Neb. 67, 251 N.W.2d 866, 90 A.L.R.3d (1977); *Little v. State Div. of Family Servs.*, 667 P.2d 49 (Utah 1983); *Elton v. County of Orange*, 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27 (1970); *Bartels v. County of Westchester*, 76 A.D.2d 517, 429 N.Y.S.2d 906 (1980). The majority attempts to distinguish these cases, implying that they addressed issues of immunity not presented here, in particular the discretionary/nondiscretionary distinction applicable to public entities. The majority then focuses on the role of the juvenile court in the placement process, with the implication that these proceedings purge all the parties of liability.[6]

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[6]The majority's claim that these cases are irrelevant, see majority at 104, can only be made in the context of the improperly framed issue upon which the majority bases its opinion. Again, the immunity based on participation in adversarial proceedings is irrelevant because the caseworkers' individual negligence is not the issue here. The majority ignores this distinction and focuses on the individuals. See, *e.g.*, majority at 104 ("applying those cases would require us to distinguish between the *caseworker's* actions in removing the child from the home and *his* actions in placing the child"). (Italics mine.) The negligence at issue is that of DSHS, a broader negligence concerning the manner in which it conducted

Many of the courts cited above faced similar statutory schemes in which a juvenile court reviewed the agency's foster placement recommendation before making the final decision. *See, e.g.*, Neb. Rev. Stat. §§ 43–208, 43–209; New York Soc. Serv. Law §§ 384, 384–b; Cal. Welf. & Inst. Code § 600 (now repealed). Although they did not discuss it, these courts decided their cases on the basis of the discretionary/nondiscretionary analysis apparently because the agencies' function was, as it is here, essentially distinct from what occurs in the dependency hearings. The *Koepf* court in particular reviewed the immunities of each major figure in the juvenile court proceedings—the judge, the county attorney, and the sheriff—before finding that the agency was not immune. 198 Neb. at 70–73. The court did not even entertain the notion that the immunities arising from the judicial proceeding could apply to the agency's prior act of factfinding. The cases above represent the majority rule in this country.

II

The law of torts serves two basic functions: it seeks to prevent future harm through the deterring effect of potential liability and it provides a remedy for damages suffered. By effectively reviving sovereign immunity, the majority strips tort law of these essential functions as it relates to the actions of the State in foster placement.

The majority implies that the fear of liability will discourage DSHS from gathering accurate placement information. On the contrary, this "fear" can only result in pressure on DSHS to perform its duties properly. Rather than inhibit the flow of placement information from DSHS, exposure to liability will help insure that such information

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home studies and supervised employees. The employees were only following agency procedures. They may have immunity in the adversary process, but their actions are not the crux of the problem. Therefore, grasping the logic of *Imbler v. Pachtman*, 424 U.S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976); *Butz v. Economou*, 438 U.S. 478, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978); and *Briscoe v. LaHue*, 460 U.S. 325, 75 L. Ed. 2d 96, 103 S. Ct. 1108 (1983) is not the point. These latter cases are the irrelevant ones.

is complete and accurate. If the agency's foster placement actions are cloaked in immunity, we have no assurance that the type of tragic event at issue here will not happen again.

In addition to failing to prevent similar occurrences in the future, the majority overlooks the second function of the law of torts. When two young girls, placed in a dangerous foster home when knowledge of its danger was readily available, were repeatedly raped and molested due to DSHS's easily avoided negligent omission, this court should not leave them without a remedy.

It is all the more distressing that the denial of recovery is based on an analysis that incorrectly frames the case's issues. The majority spends much of its time discussing the individual immunity of the caseworkers. The individuals are not liable in the first place; they were only following agency procedures. The real question concerns DSHS's actions as an agency: it followed defective home study procedures and did not train and supervise its personnel adequately. The majority does not directly address this and, as a result, decides something that is not an issue in this case.

There is evidence from which it can be argued that DSHS was negligent in the way it handled the Babcock girls' foster placement. Because these actions were not attributable to the individual caseworkers, the immunity accorded the caseworkers through their participation in adversarial proceedings is not applicable to the agency. DSHS is not immune from suit. I therefore dissent.

BRACHTENBACH and PEARSON, JJ., concur with UTTER, J.

No. 89-912

In The

Supreme Court of the United States

October Term, 1989

BETH BABCOCK, by and through her guardian; ERIKA BABCOCK; and ANGELA LONG,

Petitioners,

v.

WANDA TYLER and MARK BRONSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

INTRODUCTION

Petitioners in this civil rights damage action are three girls who were in the custody of the Washington Department of Social and Health Services (DSHS), having been placed after a juvenile court dependency finding. They sued their two state caseworkers after Lee Michael, the man in whose home they were placed, raped and assaulted them for at least fifteen months. They charged that the first caseworker, respondent Wanda Tyler, had conducted a constitutionally inadequate investigation of Michael and placed them in a dangerous environment. They asserted that the second caseworker, respondent Mark Bronson, failed to protect them from abuse while they resided in the home.

The Ninth Circuit ruled that caseworkers have absolute "quasi-judicial" or "quasi-prosecutorial" immunity for all actions which they take with respect to dependent children in state custody. It did not reach the merits of petitioners' claims.

In response to the girls' petition to this Court, challenging the expansion of absolute immunity as conflicting with this Court's decisions limiting absolute immunity and exacerbating a conflict between the circuits on the extent of caseworker immunity, respondents argue that the Ninth Circuit has not created a new form of absolute immunity, that the circuits are not in conflict, and that the children were not in state custody. This brief is written in reply to those contentions.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondents' assertions as to respondent Tyler's conduct are misleading and inaccurate. For example, respondents have attempted to justify Tyler's failure to investigate Lee Michael's criminal record by asserting that state law did not require her to do so. (Brief in opposition, p. 4) They made no such claim in either the District Court or the Ninth Circuit. Moreover, the record does not support that excuse. Wanda Tyler has never stated that she failed to explore Michael's criminal record because state law did not require it. On the contrary, when pressed, she conceded that she had no reason for failing to make the inquiry, even though a question concerning criminal arrests was on her checklist. (Deposition of Wanda Tyler).

Second, the Washington statute cited by respondents which prohibits private individuals from examining other private individuals' criminal records, (Brief in opposition, p. 4), does not explicitly prohibit one state agency from checking the records of another state agency. It also provides no defense to respondent Tyler for failing to question Michael about his criminal record or to ask him for a release to examine that record.

Third, while excusing Lee Michael because one rape charge ended in an acquittal and the other in a dismissal (Brief in opposition, pp. 3-4), respondents overlook their admission that if respondent Tyler had known about Michael's criminal history, including not only the disposition of those two charges but also numerous other charges which resulted in felony and misdemeanor convictions, she would *not* have placed the three girls in his home.

(Response to Request for Admission No. 17) Indeed, public court records, easily available to respondents, showed that Michael successfully raised the defense of lack of penetration to the charge that he raped an elderly woman. He admitted to engaging in other sexual behavior with her, short of actual intercourse. Moreover, the record shows that the attempted rape and assault charges, from the second incident, were dismissed because the victim, a friend of Michael's wife, was too terrified of Michael to press charges. Under the standard enunciated by this Court in *Youngberg v. Romeo*, 457 U.S. 307 (1982), the issue of whether a caseworker acting within the bounds of "accepted professional judgment" would place three young girls in the home of such a man is properly reserved for trial.

I.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

Relying upon the "undisputed fact" that "all of the defendant's actions of which plaintiffs complain were taken during the course of dependency proceedings," (Appendix to petition for certiorari, p. 10), i.e., while dependency proceedings were pending in the juvenile court, the court below held that the respondent caseworkers were entitled to absolute immunity for "fulfilling their post-adjudicative duties," which "may or may not be prosecutorial in nature." (App. 14) In doing so, the court below greatly broadened absolute immunity, creating a new type of caseworker immunity. The court then

extended that immunity to the caseworkers' post-adjudicative, non-prosecutorial actions in investigating prospective foster parents and monitoring the safety of children in state custody. That holding conflicts with decisions of this Court and of other circuits.

This Court has consistently evaluated claims to absolute immunity based upon function, not job title. *Forrester v. White*, 484 U.S. 219 (1988). Thus, while prosecutors have absolute immunity for initiating and conducting prosecutions, *Imbler v. Pachtman*, 424 U.S. 409 (1976), prosecutors, including the Attorney General, have only qualified immunity for conducting investigations. *Mitchell v. Forsyth*, 472 U.S. 519 (1985). The fact that caseworkers desire absolute immunity "to permit them to perform their duties without fear of even the threat of §1983 litigation," (App. 15) is irrelevant to the analysis. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

In their Brief in Opposition, respondents do not dispute this Court's analysis of absolute immunity. Instead, first, by adding to the facts upon which the court below relied, and second, by constricting the holding of the court below, respondents' brief defends a much narrower ruling than that which the court below actually issued.

First, citing to an opinion of the Washington Supreme Court, respondents repeatedly assert that the parties had a full opportunity to litigate the issue of whether the children should be placed in the Michael home. (Brief in opposition, pp. 6, 7, 9, 10) Therefore, they claim, that placement not only occurred during the course of the dependency proceedings, as the court below found, but

was "intimately associated with the judicial process." (Brief in opposition, p. 10)

As a preliminary matter, it should be noted that that assertion, even if true, is immaterial to respondent Bronson. The validity of an initial placement does not immunize the caseworker for subsequently failing to protect the child from abuse, any more than a valid arrest warrant immunizes a jailer from liability for failing to protect a pre-trial detainee.

More importantly, respondents' assertion is simply untrue, and their reliance upon *Babcock v. State*, 112 Wn.2d 83, 768 P.2d 481 (1989), is inappropriate in light of the fact that the Washington Supreme Court has granted reargument in that case, 113 Wn.2d ff 1104 (1989), thereby necessarily nullifying the prior decision. See, *In re Brown*, 6 Wash.2d 215, 101 P.2d 1003, 107 P.2d 1104 (1940). (The case was reargued on October 24, 1989, and no decision has yet been issued.)

Petitioners based their request for reargument in the Washington Supreme Court in large part upon the fact that that Court had fundamentally misunderstood the statutory nature of the review proceedings in the juvenile court. The Washington Supreme Court incorrectly found that the review hearings conducted under R.C.W. §13.34.130(3)(a) were disposition hearings under R.C.W. §13.34.110. Respondents, though they opposed the motion to reargue, acknowledged the factual mistake and conceded the true statutory nature of the juvenile court proceedings. When the Washington Supreme Court granted reargument en banc, it was thus aware of its

prior misunderstanding. Respondents therefore improperly rely upon a decision that contains a material undisputed factual error, and which is presently being reconsidered.

The court below did not base its expansion of immunity upon the parties' alleged opportunity to litigate Michael's fitness in the course of the dependency proceeding. On the contrary, recognizing that the review proceedings concerned "Rudolph Babcock['s] continued . . . efforts to regain custody of his daughters," (App. 6), the court based its holding solely upon the fact that dependency proceedings were pending at the time of the respondents' actions.

Second, by relying upon the juvenile court's supposed adjudication of Michael's fitness as a foster parent, the respondents narrow the holding of the court below in order to force that holding into the confines of this Court's decisions granting absolute immunity for actions taken by judges, prosecutors, and witnesses as part of the judicial process. (Brief in opposition, pp. 6-7)

Most of the circuits have followed this Court's functional approach in evaluating caseworkers' claims to absolute immunity in cases involving child abuse, neglect, or dependency. When the caseworker is conducting an investigation or performing a related function, most of the circuits have ruled that the caseworker has only good faith immunity. *Achterhof v. Selvaggio*, 886 F.2d 826 (6th Cir. 1989); *Vosburg v. Department of Social Services*, 884 F.2d 133, 138 (4th Cir. 1989); *Spielman v. Hildebrand*, 873 F.2d 1377 (10th Cir. 1987); *Hodorowski v. Ray*, 844 F.2d 1210 (5th Cir. 1988); *Austin v. Borel*, 830 F.2d 1356 (5th Cir.

1987); *Robison v. Via*, 821 F.2d 913 (2nd Cir. 1987); *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987).

On the other hand, when a caseworker or attorney engages in activities "that could be deemed prosecutorial," such as filing and prosecuting child abuse, neglect, or dependency proceedings in state court, several circuits have found the caseworker entitled to absolute immunity. *Vosburg v. Department of Social Services*, 884 F.2d 133, 138 (4th Cir. 1989); *Meyers v. Contra Costa County Department of Social Services*, 812 F.2d 1154 (9th Cir. 1987); *Myers v Morris*, 810 F.2d 1437 (8th Cir. 1987); *Malachowski v. City of Keene*, 787 F.2d 704 (1st Cir.) *cert. denied* 479 U.S. 828 (1986).

In addition to the court below, only the Sixth Circuit has afforded caseworkers absolute immunity for all functions they perform after a dependency proceeding has been filed. *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984).

In this case, petitioners have sued respondents for improperly performing two discrete functions: 1) selecting a foster home for three children in state custody; and 2) supervising and protecting those girls while they were in foster care. As the court below recognized, these functions are not adjudicatory; they are "post-adjudication duties." (App. 14) Nor are they prosecutorial.

Protecting children in state custody is a function of DSHS and its caseworkers. 42 U.S.C. §671(a)(10); R.C.W. §74.13.020(5); *Lipscomb v. Simmons*, 884 F.2d 1242 (9th Cir. 1989). Selecting a safe foster home for a child is similarly an agency function. As respondents stated in their brief to the Ninth Circuit, the DSHS had the right to place the

children in a home of its choice, and to move the children from one home to another without consulting the court. (Brief of Appellants Wanda Tyler and Mark Bronson to the United States Court of Appeals for the Ninth Circuit, p. 30); *In re Lowe*, 89 Wn.2d 824, 827, 576 P.2d 65, 67 (1978); *In re Gakin*, 22 Wn. App. 822, 592 P.2d 670, 671 (1979).

By incorrectly asserting that the court below based its holding upon the parties having litigated Michael's fitness to care for the petitioners, respondents incorrectly rely upon the line of cases which grant caseworkers absolute immunity for prosecuting child dependency proceedings. (Brief in opposition, pp. 7-9) In actuality, the court below afforded caseworkers immunity for all functions they perform, as long as they perform those functions while a juvenile court has jurisdiction over a dependency proceeding, a very broad holding which fails to distinguish caseworkers' prosecutorial functions from their investigatory and protective functions and thereby conflicts with decisions of other circuits.

II.

THE CHILDREN WERE IN STATE CUSTODY

Respondents make the astonishing assertion that "Petitioners were not in 'foster care' under Washington law" during the time that they were residing in the Michael home, implying that the children were in the legal custody of Lee and Janet Michael, rather than the legal custody of the state. (Brief in opposition, p. 3) Except for the semantic technicality that the Washington statutes do not use the term "foster care," that statement

is untrue. The children uncontrovertedly were in foster care as this Court used the term in *DeShaney v. Winnebago County Department of Social Services*, ___ U.S. ___, 109 S.Ct. 998, 1006 n. 9 (1989), i.e., they had been removed from their father "by the affirmative exercise of [state] power" and "placed in a foster home operated by [the state's] agents." *Id.*

Here, the state had removed the girls from their father through a dependency proceeding, taken them into its "care, custody, and control" upon a finding of dependency. (App. 26; see also petition, p. 5 and n. 1) As dependent children, their "legal custody reside[d] with the state." *In re Kevin L.*, 45 Wash. App. 489, 726 P.2d 479, 485 (Div. 2, 1986), (McInturff, J., concurring). DSHS paid Lee Michael to provide care for the girls. He was not even a party to the dependency proceeding. He was thus the agent of DSHS, not the girls' legal guardian or custodian.

CONCLUSION

In just the last three years there have been numerous court of appeals opinions on caseworker immunity, while prior to 1984 there were none. Some of these opinions are in conflict, and clear guidance from this Court is greatly needed. For all the aforementioned reasons, the petition should be granted.

Respectfully submitted,

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